Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1288 OF 2011, W-02–424 OF 2011, W-02–429 OF 2011, W-02–430 OF 2011, W-02–432 OF 2011, W-02–384 OF 2011, W-02–479 OF 2011, W-02–481 OF 2011 & W-02–482 OF 2011, W-02–423 OF 2011 & W-02–431 OF 2011 AND W-02–501 OF 2011
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9 NOVEMBER 2012

Companies and Corporations — Joint venture — Liability for losses — Reliefs sought from second to 24th defendants — Whether all defendants liable for losses — Claim of dishonest assistance and/or abetment — Whether all defendants involved in dishonest assistance and/or abetment — Whether there was joint venture — Whether there was breach of fiducary duties — Deeds of sale and deeds of resale — Whether resolutions void and of no effect — Order to set aside voluntary winding up of 22nd defendant — Whether three deeds of sale and three deeds of resale void and of no effect

In the present appeal, the respondent ('Doran') claimed he had a joint venture with the appellant ('Alan') but had lost his entire investment due to the latter's breach of the joint venture and breach of fiduciary duties. The joint venture project was to recycle plastic waste into plastic flakes and to produce plastic staple fibre from plastic flakes where Doran claimed that he invested RM17,601,051.57, and supplied raw materials to the value of RM5,398,830.33. Apart from Alan, the plaintiffs also sought reliefs from the second to the 24th defendants, whom the plaintiffs alleged had dishonestly assisted and/or abetted Alan. The thrust of the allegations against Alan was that he, in breach of shareholders' agreements and in breach of his fiduciary duties, had seized control of the two joint venture companies through dubious resolutions, dubious appointments of additional directors, and illegitimate allotments of shares; and with such control caused or procured s 218 notices, based on fictitious debts payable by the 22nd defendant, to be served on the 22nd defendant, and caused or procured the 22nd defendant to be wound up; stripped the 22nd defendant's assets through three sham deeds of sale and three sham deeds of resale; and removed and disposed the raw material. Although the joint venture was not disputed, the breach was disputed. At the end of the trial, the trial court held in favour of the plaintiffs and the plaintiffs were awarded sums greater than the total sums claimed. Briefly, the facts were that by a shareholders' agreement dated 9 July 2006 ('SA1'), the relevant parties entered into a joint venture to recycle plastic waste into plastic flakes. SA1 provided that a company would be acquired or incorporated to carry out that joint venture,

and that the equity of that company would be held in the proportion of 51% (Doran), 15% (Parker) and 34% (the 19th defendant). Plascon Technologies Sdn Bhd ('the 22nd defendant') was the company incorporated or acquired for that purpose, with Alan as the managing director. By another agreement dated 27 November 2006 ('SA2'), the relevant parties entered into a joint venture to process plastic flakes into plastic staple fibre. Inter alia, SA2 provided that a company would be incorporated or acquired to carry out that joint venture, and that the equity of that company would be held in the proportion of 50% (Doran), 20% (Alan), and 30% (Tiong). AK Staple Fibre Manufacturing Plascon Sdn Bhd ('the 21st defendant') was the company acquired or incorporated for that purpose, with Alan as executive vice chairman, Doran as non-executive vice chairman and Tiong as managing director. Initially, the 21st defendant's equity was held in the agreed proportion. That changed when Tiong sold his shares in the 21st defendant to Doran in June 2007, resulting in the equity of the 21st defendant to be held in the proportion of 70% (Doran) and 30% (Alan). Both SA1 and SA2 provided that the provisions of those agreements would prevail over the articles of the companies to be acquired or incorporated. Both SA1 and SA2 provided that shareholders would 'make up the initial paid up capital' of those joint venture companies and would 'provide shareholders loans' to the joint venture companies. SA1 and SA2 capped the total amount of shareholders loans. Until February 2008, when Doran appointed one Phillip Finlay ('Finlay') as the managing director of the 22nd defendant, Alan had full operational control of the 21st and 22nd defendants. Finlay, who was Doran's appointee, was in charge of joint venture operations from February 2008 to June 2008, that the plant and machinery of the 22nd defendant were moved from the factory at TPG to the factory at Meru on the instructions of Doran, that the same said plant and machinery were later moved back to the factory at TPG, and that that removal of the plant and machinery from the factory at Meru to the factory at TPG constituted the basis of the complaint that Alan removed and sold the plant and machinery of the 22nd defendant to benefit himself. Doran was fraudulently induced by Alan to agree to an amendment to article 90 of the memorandum of articles of the 22nd defendant which allowed Alan to gain control of the bank accounts of the 22nd defendant and to control the disbursement of Doran's investment. Unamended, the said article 90 required circular resolutions to be passed by all directors. On 28 July 2007, Alan misrepresented to Doran that an amendment to article 90 was urgently needed to facilitate the passing of company resolutions by directors present in Malaysia, as the banker's guarantee that was required for the clearance of a shipment of raw material could not be obtained without a company resolution. Alan further misrepresented that the amended article 90 would only be used for the purpose of the said banker's guarantee, and that the consent of the plaintiffs would still be required to validate all resolutions. Alan knew that his representation was false as the amended article 90 was used to pass other resolutions. However, those allegations of misrepresentation, as a separate course of action, were abandoned by the

plaintiffs. Instead, the plaintiffs relied on breach of shareholders' agreements and breach of fiduciary duties as the cause of action against Alan, and on 'knowing assistance' as the cause of action against the other defendants. The plaintiffs sought declarations to declare all said resolutions as void and of no effect; an order to set aside the voluntary winding up of the 22nd defendant; and a declaration to declare the three deeds of sale and three deeds of resale as void and of no effect.

Held, allowing the appeal in part with no order as to costs; allowing the appeal of other defendants with costs:

(1) Given the state of the pleadings and prayers, the court could not support those final awards against all the defendants with respect of the condominium, for those awards were not in accord with the pleaded case. To hold any accessory to account, the plaintiffs must prove the loss occasioned by the 'knowing assistance' of the accessory on an individual basis. The court below ordered all the defendants to pay RM17,601,051.57 (the cash injected) without distinction. One punishment meted out was an unjust result. Even if it were proven that the other defendants were accessories as pleaded, the order that the other defendants pay RM17,601,051.57 could not stand, for on the pleaded case they were not so liable (see para 27).

(2) The court could not support the award of RM17,601,051.57 against the second, ninth, 13th, 15th-18th and 23rd defendants. Since the loss occasioned by the 'knowing assistance' of the other defendants could not be proved, it should follow that full compensation could not be awarded. Yet, the court below ordered every other defendant to pay RM17,601,051.57 when the alleged loss that could have been occasioned by the knowing assistance of all other defendants, who even together, could not, on the pleaded case, ever extend to that amount. No one other defendant was alleged to have assisted Alan in the matter of the unauthorised payments and machinery, and the loss thereof, which could not be attributed to all accessories, must therefore be deducted from the alleged overall loss of RM17,601,051.57. Only the fifth, sixth, 13th, 15th, 16th, 17th and 23rd were implicated in the matter of the three deeds of sale and three deeds of resale. The loss occasioned by those three deeds of sale and three deeds of resale, which could not be attributed to the rest of the other defendants, must also, in relation to them, be deducted from the alleged overall loss of RM17,601,051.57. No one other defendant could be liable to the extent of RM17,601,051.57, that is, even if it were true that all other defendants were jointly and or severally liable for the knowing assistance of all. It could not be clearer that the order to all other defendants to pay RM17,601,051.57 could not be sustained, for no such loss or any other losses had been proved against the other defendants or any one of them (see paras 28 & 33).

(3) The joint venture was nonetheless set into motion and implemented, quite unaffected by changes to the shareholdings in the joint venture companies that were brought about by the withdrawal of shareholders, which were all but admitted by Alan. The fiduciary obligations of Alan should not be viewed from just SA1 and or SA2 but also from the course of dealings pursued and the conduct of the parties. A fiduciary relationship could arise and fiduciary duties could exist between parties who have not reached, and who may never reach agreement upon the consensual terms which are to govern the arrangement between them. On the facts, it was so clear that there was a joint venture. The joint venture companies were testament to that. Joint venturers hold all assets committed to the joint venture as tenants in common. When those resolutions were passed, Doran lost all control of the joint venture companies and his investment. That was the foremost breach of trust and confidence by Alan (see para 53).

(4) While the court below was right about the test of honesty or dishonesty being an objective one, it totally misdirected itself that its duty was only to find 'whether the remaining defendants either alone or together aided and abetted Kuan and/or Doitbest and Target Concept in the breach by Kuan of the fiduciary duties owed to Doran and are consequently liable to make good the losses suffered by the plaintiffs' to close the issue. The duty of the court below was also to find if the other defendants were dishonest. However, there was not a single finding by the court below that any of the other defendants were dishonest. There were umpteen findings of dishonesty against Alan but none against the other defendants. The court ought to be slow to supply the omission of the court below. In the first place, there were no pleaded facts upon which the allegation of dishonesty was founded and no pleaded facts upon which reliance was placed to demonstrate that the objective test was satisfied (see paras 62 & 65).

(5) The court could not support the orders against the other defendants, not only because of the state of the pleadings and prayers and the absence of proof of loss occasioned by each and every other defendant, but also because the findings of the court below on dishonest assistance fell short of the requirements of law. The court also did not supply the omission of the court below, to find dishonest assistance. Given that there were no pleaded facts upon which the allegation of dishonesty was founded and no pleaded facts upon which reliance was placed to demonstrate that the objective test was satisfied, and given that it was not satisfactorily shown that the sixth and 23rd defendants were in a dishonest state of mind when they entered into the three deeds of sale and three deeds of resale, there was no reason to supply the omission of the court below. Given further that there was no proof of the loss occasioned by those three deeds of sale and three deeds of resale, the court have no reason whatsoever to support

the court below in its final award against the sixth, 15th, 16th, 17th and 23rd defendants. There were no pleaded facts upon which the allegation of dishonesty was founded and no pleaded facts upon which reliance was placed to demonstrate that the objective test was satisfied. In the result, there were no findings of facts upon which the allegation of dishonestly was founded and upon which reliance was placed to demonstrate that the objective test was satisfied (see paras 98, 87–88).

(6) The court unanimously ordered that Alan do pay the plaintiffs the sum of RM9,932,931.40 together with interest at the rate of 4% pa from the date of judgment below to date of satisfaction, and that save as otherwise expressly provided, all orders of the court below, with respect to the claim for breach of shareholders' agreement and breach of fiduciary duties and knowing assistance were set aside (see para 113).

(7) As for the incidental claim, it was the finding of the court below that on the advice of Alan, Doran paid RM590,000 towards his purchase of the said condominium through the 20th defendant as the trustee for Doran. It was the pleaded case that Alan was also Doran's trustee for the said condominium. The pleaded defence of Alan was that the said RM590,000 was repaid to the 22nd defendant. However, it was the finding of the court below that repayment by 20th and 22nd defendants was not proved. Absolutely no reason was made out to disturb that finding. The court unanimously dismissed those appeals against that order with costs and affirm the order that Alan and the 20th defendant, who withdrew its appeal, do pay Doran the sum of RM590,000 together with interest at the rate of 4% pa from the date of judgment below to date of satisfaction (see para 114).

[Bahasa Malaysia summary

Dalam rayuan ini, responden ('Doran') mendakwa dia telah berusaha sama dengan perayu ('Alan') tetapi telah hilang keseluruhan pelaburannya akibat pelanggaran usaha sama dan pelanggaran tugas-tugas fidusiari oleh Alan. Projek usaha sama itu adalah untuk mengitar semula buangan plastik kepada serpihan plastik dan untuk menghasilkan fiber serat plastik daripada serpihan plastik itu di mana Doran mendakwa dia telah melabur sebanyak RM17,601,051.57, dan membekalkan bahan mentah bernilai RM5,398,830.33. Selain daripada Alan, plaintif-plaintif juga memohon relief-relief daripada defendan-defendan kedua hingga ke-24, yang mana plaintif-plaintif mendakwa telah membantu secara tidak jujur dan/atau bersubahat dengan Alan. Asas dakwaan-dakwaan terhadap Alan adalah bahawa dia, dalam melanggar perjanjian-perjanjian pemegang saham dan dalam melanggar tugas-tugas fidusiarinya, telah mengambil kawalan dua syarikat usaha sama melalui resolusi yang meragukan, pelantikan pengarah-pengarah yang meragukan, dan pengumpukan saham secara tidak sah; dan dengan kawalan sedemikian telah menyebabkan atau mendapatkan notis-notis s 218,

berdasarkan hutang-hutang rekaan yang perlu dibayar oleh defendan ke-22, untuk disampaikan ke atas defendan ke-22, dan menyebabkan atau mendapatkan defendan ke-22 digulungkan; melucutkan aset-aset defendan ke-22 melalui tiga surat ikatan jualan palsu dan tiga surat ikatan jualan semula palsu; dan mengalih dan menjual bahan mentah tersebut. Walaupun usaha sama itu tidak dipertikaikan, pelanggaran itu dipertikaikan. Di akhir perbicaraan mahkamah perbicaraan memutuskan berpihak kepada plaintif-plaintif dan mereka diawardkan jumlah lebih besar daripada keseluruhan jumlah yang dituntut. Secara ringkas, faktanya adalah melalui perjanjian pemegang saham bertarikh 9 Julai 2006 ('PPS1'), pihak-pihak berkaitan telah memasuki usaha sama untuk mengitar semula buangan plastik kepada serpihan plastik. PPS1 memperuntukkan bahawa syarikat tersebut akan diperoleh atau diperbadankan untuk menjalankan usaha sama tersebut, dan bahawa ekuiti syarikat tersebut akan dipegang dalam pembahagian 51% (Doran), 15% (Parker) dan 34% ('defendan ke-19'). Plascon Technologies Sdn Bhd ('defendan ke-22') adalah syarikat yang diperbadankan atau diperoleh bagi tujuan tersebut, di mana Alan sebagai pengurus urusan. Melalui perjanjian lain bertarikh 27 November 2006 ('PPS2'), pihak-pihak berkaitan telah memasuki usaha sama untuk memproses serpihan plastik kepada fiber serat plastik. Antara lain, PPS2 memperuntukkan bahawa sebuah syarikat akan diperbadankan atau diperoleh untuk menjalankan usaha sama tersebut, dan bahawa ekuiti syarikat tersebut akan dipegang dalam pengagihan 50% (Doran), 20% (Alan), dan 30% (Tiong). AK Staple Fibre Manufacturing Plascon Sdn Bhd ('defendan ke-21') adalah syarikat yang diperoleh atau diperbadankan bagi tujuan tersebut, di mana Alan adalah naib pengerusi, Doran sebagai bukan eksekutif dan Tiong sebagai pengarah urusan. Pada mulanya, ekuiti defendan ke-21 dipegang dalam pengagihan yang dipersetujui. Ianya berubah apabila Tiong menjual sahamnya dalam defendan ke-21 kepada Doran pada Jun 2007, yang mengakibatkan ekuiti defendan ke-21 dipegang dalam pengagihan 70% (Doran) dan 30% (Alan). Kedua-dua PPS1 dan PPS2 memperuntukkan bahawa peruntukan-peruntukan perjanjian-perjanjian tersebut akan mengatasi artikel-artikel syarikat-syarikat yang akan diperoleh atau diperbadankan. Kedua-dua PPS1 dan PPS2 memperuntukkan bahawa pemegang-pemegang saham akan 'make up the initial paid up capital' daripada syarikat-syarikat usaha sama tersebut. PPS1 dan PPS2 telah menutup jumlah keseluruhan pinjaman-pinjaman pemegang-pemegang saham. Sehingga Februari 2008, apabila Doran melantik Phillip Finlay ('Finlay') sebagai pengarah urusan kepada defendan ke-22, Alan mempunyai kawalan operasi sepenuhnya ke atas defendan-defendan ke-21 dan ke-22. Finlay, yang dilantik Doran, adalah orang yang bertanggungjawab untuk operasi usaha sama itu dari Februari 2008 hingga Jun 2008, di mana loji dan peralatan mesin defendan ke-22 dialih daripada kilang di TPG ke kilang di Meru atas arahan Doran, yang mana loji dan peralatan mesin tersebut kemudian dialih balik ke kilang di TPG, dan pengalihan loji dan peralatan mesin dari kilang di Meru ke kilang di TPG menjadi asas aduan bahawa Alan

telah mengalih dan menjual loji dan peralatan mesin defendan ke-22 untuk keuntungan diri sendiri. Doran secara fraud telah mempengaruhi Alan untuk bersetuju dengan pindaan kepada perkara 90 memorandum artikel defendan ke-22 yang membenarkan Alan mendapat kawalan ke atas akaun bank defendan ke-22 dan untuk mengawal bayaran pendahuluan Doran. Jika tidak dipinda, perkara 90 tersebut mengkehendaki resolusi-resolusi pekeliling diluluskan oleh semua pengarah. Pada 28 Julai 2007, Alan memberi salah nyata kepada Doran bahawa pindaan kepada perkara 90 diperlukan dengan segera untuk memudahkan kelulusan resolusi-resolusi syarikat tersebut oleh pengarah-pengarah yang ada di Malaysia, kerana jaminan bank yang mengkehendaki pelepasan penghantaran bahan mentah melalui kapal tidak dapat diperoleh tanpa resolusi syarikat tersebut. Alan selanjutnya memberi salah nyata bahawa pindaan perkara 90 hanya akan digunakan bagi tujuan jaminan bank, dan bahawa persetujuan plaintif-plaintif masih diperlukan untuk mengesahkan semua resolusi-resolusi. Alan mengetahui bahawa representasinya adalah palsu kerana pindaan perkara 90 telah digunakan untuk meluluskan resolusi-resolusi lain. Walau bagaimanapun, semua dakwaan salah nyata, sebagai tindakan berasingan, telah ditinggalkan oleh plaintif-plaintif. Sebaliknya, plaintif-plaintif bergantung kepada pelanggaran perjanjian-perjanjian pemegang saham dan pelanggaran tanggungjawab fidusiari sebagai kausa tindakan terhadap Alam, dan berdasarkan 'knowing assistance' sebagai kausa tindakan terhadap defendan-defendan lain. Plaintif-plaintif memohon deklarasi untuk mengisytiharkan semua resolusi tersebut sebagai tidak sah dan tidak berkuat kuasa; satu perintah untuk mengetepikan penggulungan sukarela defendan ke-22; dan deklarasi untuk mengisytiharkan tiga surat ikatan jualan dan tiga surat ikatan jualan semula tersebut sebagai tidak sah dan tidak berkuat kuasa.

Diputuskan, membenarkan rayuan sebahagiannya tanpa perintah untuk kos; membenarkan rayuan defendan-defendan lain dengan kos:

(1) Berdasarkan pliding dan permohonan yang dikemukakan, mahkamah tidak boleh menyokong award-award muktamad terhadap semua defendan berkaitan kondominium, kerana award-award tersebut tidak sesuai dengan kes yang dipohon. Untuk memutuskan mana-mana peserta bertanggungjawab, plaintif-plaintif hendaklah membuktikan kerugian berlaku dengan 'knowing asistance' oleh peserta atas dasar individu. Mahkamah bawahan telah memerintahkan semua defendan-defendan membayar RM17,601,051.57 (disalurkan secara wang tunai) tanpa perbezaan. Satu hukuman yang dikenakan adalah hasil yang tidak adil. Jikapun dapat dibuktikan bahawa defendan-defendan lain adalah peserta seperti yang diplidkan, perintah bahawa defendan-defendan lain membayar RM17,601,051.57 tidak boleh kekal, kerana mereka tidak bertanggungjawab ke atas kes yang diplikan (lihat perenggan 27).

(2) Mahkamah tidak boleh menyokong award RM17,601,051.57 terhadap defendan-defendan kedua, kesembilan, ke-13, ke-15 hingga ke-18 dan ke-23. Oleh kerana kerugian yang berlaku dengan 'knowing assistance' defendan-defendan lain tidak dapat dibuktikan, hendaklah diikuti bahawa pampasan penuh tidak boleh diawardkan. Namun begitu, mahkamah bawahan telah memerintahkan setiap daripada defendan-defendan lain untuk membayar RM17,601,051.57 apabila kerugian yang dikatakan itu mungkin berlaku disebabkan oleh bantuan pengetahuan semua defendan-defendan lain, yang mungkin secara bersama pun tidak boleh atas kes yang diplidkan mampu membayar jumlah tersebut. Tiada selain defendan lain yang didakwa telah membantu Alan dalam perkara bayaran-bayaran tidak sah dan peralatan mesin, dan kerugian tersebut, yang tidak boleh dianggap telah disebabkan oleh semua peserta, hendaklah dengan itu dipotong daripada kerugian keseluruhan yang dikatakan berjumlah RM17,601,051.57. Hanya defendan-defendan kelima, keenam, ke-13, ke-15, ke-16, ke-17 dan ke-23 terlibat dalam perkara tiga surat ikatan jualan dan tiga surat ikatan jualan semula tersebut. Kerugian yang berlaku disebabkan tiga surat ikatan jualan dan tiga surat ikatan jualan semula itu, yang tidak boleh dianggap telah disebabkan oleh defendan-defendan lain yang selainnya, juga hendaklah, berkaitan dengan mereka, dipotong daripada kerugian keseluruhan yang dikatakan berjumlah RM17,601,051.57. Tiada sesiapa selain defendan lain yang boleh bertanggungjawab untuk membayar RM17,601,051.57, iaitu jikapun ia dalah benar bahawa semua defendan lain bertanggungjawab secara bersama dan/atau secara berasingan kerana membantu dengan pengetahuan tentang semuanya. Tiada yang lebih jelas bahawa perintah kepada semua defendan lain untuk membayar RM17,601,051.57 tidak boleh kekal, kerana kerugian sedemikian atau apa-apa kerugian lain telah dibuktikan terhadap defendan-defendan lain atau mana-mana dairpada mereka (lihat perenggan 28 & 33).

(3) Usaha sama itu meskipun dimulakan dan dilaksanakan, tidak terjejas akibat perubahan kepada pemegang-pemegang saham dalam syarikat-syarikat usaha sama yang ditimbulkan oleh penarikan diri pemegang-pemegang saham, yang semuanya tidak diakui oleh Alan. Tanggungjawab fidusiari Alan tidak patut dilihat dari segi PPS1 dan/atau PPS 2 tetapi juga daripada perjalanan urusan yang dimulakan dan perilaku pihak-pihak. Hubungan fidusiari boleh timbul dan tanggungjawab fidusiari boleh wujud antara pihak-pihak yang tidak mencapai dan yang mungkin tidak akan mencapai persetujuan berdasarkan terma-terma persetujuan yang patut mengawal urusan antara mereka. Berdasarkan fakta, adalah jelas bahawa terdapat usaha sama. Syarikat-syarikat usahasama tersebut adalah bukti perkara tersebut. Pemegang-pemegang usahasama tersebut memegang semua

aset yang berkenaan usaha sama sebagai penyewa-penyewa bersama. Apabila resolusi-resolusi tersebut diluluskan, Doran telah hilang semua kawalan ke atas syarikat-syarikat usahasama dan pelaburannya. Itulah pelanggaran kepercayaan dan keyakinan oleh Alan (lihat perenggan 53).

(4) Walaupun mahkamah bawahan betul tentang ujian kejujuran atau ketidakjujuran sebagai suatu yang objektif, ia telah salah arah berdasarkan tanggungjawabnya untuk hanya mendapati 'sama ada defendan-defendan yang tinggal sama ada sendiri atau bersama telah membantu dan bersubahat dengan Kuan dan/atau Doitbest dan Target Concept dalam pelanggaran tanggungjawab fidusiari Kuan terhadap Doran dan berikutan itu bertanggungjawab untuk menanggung kerugian yang dialami oleh plaintif-plaintif' untuk menyelesaikan isu tersebut. Kewajipan mahkamah bawahan juga adalah untuk mendapati jika defendan-defendan lain tidak bersikap jujur. Walau bagaimanapun, tiada satu penemuan oleh mahkamah bawahan bahawa mana-mana defendan lain telah bersikap tidak jujur. Terdapat banyak penemuan ketidakjujuran terhadap Alan tetapi tiada terhadap defendan-defendan lain. Mahkamah tidak sepatutnya terus membuat kesimpulan terhadap peninggalan mahkamah bawahan. Bahkan, tiada fakta yang diplidkan berhubung dakwaan ketidakjujuran yang didapati dan tiada fakta yang diplidkan di mana ia bergantung kepada pelaksanaan ujian objektif yang telah dipenuhi (lihat perenggan 65).

(5) Mahkamah tidak dapat menyokong perintah-perintah terhadap defendan-defendan lain, dan bukan sahaja kerana keadaan pliding dan permohonan dan ketiadaan bukti kerugian yang disebabkan oleh setiap dan semua defendan lain, tetapi juga kerana penemuan-penemuan mahkamah bawahan berhubung bantuan yang tidak jujur tidak memenuhi keperluan undang-undang. Mahkamah juga tidak memberikan peninggalan oleh mahkamah bawahan, untuk membuktikan bantuan yang tidak jujur. Berdasarkan tiada fakta diplidkan yang didapati atas dakwaan ketidakjujuran dan tiada fakta diplidkan yang mana ia bergantung kepada pelaksanaan ujian objektif yang dipenuhi, dan berdasarkan itu adalah tidak ditunjukkan bahawa defendan-defendan keenam dan ke-23 bersikap tidak jujur apabila mereka memasuki tiga surat ikatan jualan dan tiga surat ikatan jualan semula, tiada sebab untuk memberikan peninggalan kepada mahkamah bawahan. Berdasarkan tiada bukti selanjutnya tentang kerugian yang disebabkan oleh tiga surat ikatan jualan dan tiga surat ikatan jualan semula tersebut, mahkamah tidak mempunyai sebab untuk menyokong mahkamah bawahan dalam award muktamadnya terhadap defendan-defendan keenam, ke-15, ke16, ke-17 dan ke-23. Tiada fakta diplidkan di mana dakwaan ketidakjujuran didapati dan tiada fakta diplidkan yang mana ia bergantung kepada pelaksanaan bahawa ujian objektif telah dipenuhi. Akibatnya, tiada penemuan fakta berhubung

dakwaan ketidakjujuran didapati dan yang mana bergantung kepada pelaksanaan bahawa ujian objektif telah dipenuhi (lihat perenggan 98, 87–88).

(6) Mahkamah sebulat suara memerintahkan agar Alan membayar plaintif-plaintif sejumah RM9,932,931.40 bersama faedah pada kadar 4% setiap tahun daripada tarikh penghakiman mahkamah bawahan hingga tarikh penyelesaian, dan tertakluk jika dinyatakan sebaliknya sebagaimana diperuntukkan, semua perintah mahkamah bawahan, berkaitan tuntutan pelanggaran perjanjian pemegang-pemegang saham dan pelanggaran tanggungjawab fidusiari dan bantuan dengan pengetahuan diketepikan (lihat perenggan 113).

(7) Berhubung tuntutan sampingan, adalah penemuan mahkamah bawahan bahawa atas nasihat Alan, Doran telah membayar RM590,000 untuk kondominium yang dibelinya melalui defendan ke-20 sebagai pemegang amanah Doran. Adalah kes yang diplikan bahawa Alan juga pemegang amanah Doran untuk kondominium tersebut. Pembelaan Alan yang diplikan adalah bahawa RM590,000 tersebut telah dibayar balik kepada defendan ke-22. Walau bagaimanapun, adalah penemuan mahkamah bawahan bahawa bayaran balik oleh defendan-defendan ke-20 dan ke-22 tidak dibuktikan. Tiada sebab langsung telah dibuat untuk mengganggu penemuan tersebut. Mahkamah sebulat suara menolak rayuan-rayuan tersebut terhadap perintah tersebut dengan kos dan mengesahkan perintah tersebut bahawa Alan dan defendan ke-20, yang menarik balik rayuannya, hendaklah membayar Doran sejumlah RM590,000 bersama faedah pada kadar 4% setiap tahun dari tarikh penghakiman mahkamah bawahan hingga tarikh penyelesaian (lihat perenggan 114).]

Notes

For a case on liability for losses, see 3(1) *Mallal's Digest* (4th Ed, 201 Reissue) para 429.

Cases referred to

Abou-Rahmah v Abacha [2006] EWCA Civ 1492, CA (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Barlow Clowes International Ltd (in liquidation) and others v Eurotrust International Ltd and others [2006] 1 WLR 1476, PC (refd)

Barnes v Addy (1874) LR 9 Ch App 244, CA (refd)

Brian Pty Ltd v United Dominions Corpn Ltd [1983] 1 NSWLR 490, CA (refd)

Broome v Cassell & Co Ltd and another [1971] 1 All ER 262; [1971] 2 QB 354, CA (refd)

Charles Henry Palmer v Edwin John Lark and Edith May Lark [1945] 1 All ER 355 (refd)

Chartered Bank, The v Yong Chan [1974] 1 MLJ 157, FC (refd)

Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party) [2011] 4 MLJ 354, HC (folld)
Chirnside v Fay [2006] NZSC 68, SC (refd)
Chooi Siew Cheng v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513, FC (refd)
Coflexip SA Coflexip Stena Offshore Limited v Stolt Offshore MS Limited and others [2003] EWCA Civ 296, CA (refd)
Day v Mead [1987] 2 NZLR 443, CA (refd)
Doyle v Olby Ltd [1969] 2 QB 158, CA (refd)
Erie County Natural Gas & Fuel Co Ltd v Carroll [1911] AC 105, PC (refd)
Esso Petroleum Co Ltd and another v Southport Corporation [1955] 3 All ER 864, HL (refd)
Goose v Wilson Sandford & Co (a firm) [2000] All ER (D) 324, CA (refd)
Grupo Torras SA and another v Sheikh Fahad Mohammed Al Sabah and others [1999] All ER (D) 176, CA (refd)
Guaranty Trust Company of New York v Hannay & Company [1915] 2 KB 536, CA (refd)
Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, CA (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)
Haw Paw Brothers International & Anor v Jack Chiarapurk & Ors [1991] 2 MLJ 428, HC (refd)
Hodgkinson v Simms (1994) 117 DLR (4th) 151, SC (refd)
Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332, HC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Johnson v Agnew [1980] AC 367, HL (refd)
Kay Synergy Sdn Bhd v Malayan Banking Bhd [2007] 6 MLJ 159, HC (refd)
Kementerian Pertahanan Malaysia & Anor v Malaysian International Shipping Corp Bhd & Ors [2007] 5 MLJ 393, CA (refd)
Kerry v Carter [1969] 1 WLR 1372, CA (refd)
King, The v Henry Salomons (1786) 1 TR 249, KB (refd)
Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd [2006] 6 MLJ 544, CA (folld)
Lawrence v Lord Norreys and others (1880) 15 App Cas 210, HL (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
London Passenger Transport Board v Moscrop [1942] 1 All ER 97, HL (refd)
Menno Leendert Vos v Global Fair Industrial Limited & ors [2009] HKCU 1910, HC (refd)
Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276, HC (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)
Pharmmalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel & Ors [2004] 7 CLJ 465, HC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2009] 5 MLJ 770, CA (refd)

Rookes v Barnard [1964] AC 1129, HL (refd)

Royal Brunei Airlines Sdn Bhd v Phillip Tan Kok Ming [1995] 2 AC 378; [1995] 3 All ER 97, PC (not folld)

Satnam Investment Ltd v Dunlop Heywood & Co Ltd and others [1999] 3 All ER 652, CA (refd)

Seven Seas Supply Co v Rajoo [1966] 1 MLJ 71, FC (refd)

Superintendent of Lands and Surveys Department Bintulu Division & Anor v Agi ak Bungkong & Ors [2012] 1 MLJ 335, CA (refd)

Swindle and others v Harrison and another [1997] 4 All ER 705, CA (refd)

Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188, FC (refd)

Target Holdings Ltd v Redfern [1995] 3 All ER 785, HL (refd)

Thompson v Smith's Shiprepairers (North Shields) Ltd [1984] QB 405, QBD (refd)

Twinsectra Ltd v Yardley [2002] UKHL 12, HL (refd)

2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd [2012] All ER (D) 84 (Jul) (refd)

Victoria Street Apartments Ltd v Suren Sharma [2012] NZHC 2 (refd)

Wallingford v Mutual Society (1880) 5 App Cas 685, HL (refd)

Legislation referred to

Companies Act 1965 s 218

Rules of the Supreme Court 1965 [UK] O 18 r 8(3)

Harpal Singh (Fiona Bodipalar with him) (Bodipalar Ponnudurai De Silva) in Civil Appeal No W-02–1288 of 2011 for the appellant.

Cyrus Dass (Prakash Lachmanan with him) (Mathews Hun Lachimanan) in Civil Appeal Nos W-02–424 of 2011, W-02–429 of 2011, W-02–430 of 2011 and W-02–432 of 2011 for the appellants.

SP Muthu Veloo (Shahrizat bte Hashim with him) (SP Veloo & Co) in Civil Appeal No W-02–384 of 2011 for the appellant.

Balvinder Singh (KS Shasha with him) (Balvinder Singh Kenth) in Civil Appeal No W-02–479 of 2011 for the appellants.

Fiona Bodipalar (Bodipalar Ponnudurai De Silva) in Civil Appeal Nos W-02–481 of 2011 and W-02–482 of 2011 for the appellants.

Prakash Lachimanan (Mathews Hun Lachimanan) in Civil Appeal Nos W-02–423 of 2011 and W-02–431 of 2011 for the appellants.

George Cheong in Civil Appeal No W-02–501 of 2011 appellant in person.

David Morais (Leong Phaik Leng with him) (Sreenevasan Young) in Civil Appeal Nos W-02–1288 of 2011, W-02–424 of 2011, W-02–429 of 2011, W-02–430 of 2011, W-02–432 of 2011, No W-02–384 of 2011, No W-02–479 of 2011, W-02–481 of 2011 & W-02–482 of 2011, W-02–423 of 2011 & W-02–431 of 2011 and W-02–501 of 2011 for the respondents.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] 'Nothing ventured, nothing gained'. Robert Doran ('Doran — the first plaintiff') claimed he had a joint venture with Kuan Pek Seng @ Alan Kuan ('Alan') to recycle plastic waste into plastic flakes and to produce plastic staple fibre from plastic flakes, but that he lost his entire investment by reason of Alan's breach of the joint venture and breach of fiduciary duties. Doran claimed that his investment in the joint venture was made up of his cash injection of RM17,601,051.57, and his supply, through the third plaintiff, of raw material (which was plastic waste) to the value of RM5,398,830.33. Apart from Alan, the plaintiffs also sought relief from defendants 2 to 24, whom the plaintiffs alleged had dishonestly assisted and or abetted Alan.

[2] There were three plaintiffs. But for the purposes of these appeals, all the three plaintiffs could be rolled into one, for Doran, a citizen of the United Kingdom who resided at Dubai, also controlled, through his control of Crayford Group Holdings of Iceland, both Plascon Technologies Ltd of Cyprus ('the second plaintiff — PT') and Tadweer FZE of the United Arab Emirates ('the third plaintiff — Tadweer'). There were 24 defendants. Alan was the defendant 1. Defendant 2 (Kuan Shin @ Kuan Nyong Hin), 3 (Tan Kim Hiok) and 4 defendant (Tang Wan Yin) were Alan's father, mother and wife. Defendant 3 was a director of the defendant 13 (Liberty Equity Sdn Bhd), 14 (Doitbest Holdings Sdn Bhd), 22 (Plascon Technologies Sdn Bhd, in liquidation) and 24 (AK Plastictech Recycling Sdn Bhd). Defendant 4 was a substantial shareholder of defendant 14. Defendant 5 (Leong Kai Sing @ Deric Leong), 6 (Leong Fuk Sing @ Tony Leong) and 23 (Leong Kar Poh) were brothers. The defendants 6 and 23 defendant were directors of defendant 16 (Techfident Engineering Sdn Bhd). Defendant 6 was also the sole proprietor of defendant 17 (Progressive Management Consult) and Alan's brother-in-law. Defendant 7 (Selva Kumar a/l Mookiah) was the company secretary and legal advisor of the defendant 22. Defendant 8 (Sri Ram a/l Mookiah), a director of the defendant 22, controlled defendant 18 (Sri Chenderiang Sdn Bhd). Defendant 9 (Cheong Chan Wan @ George Cheong) was a director of defendant 13 as well as the chief operating officer of defendant 22's factory at Meru (defendant 9 who represented himself had not filed any memorandum of appeal. Nevertheless, defendant 9 was allowed to proceed with his appeal without objections from the plaintiffs). Defendant 13 was wholly owned by the defendant 14. Defendant 14 and defendant 19(Target Concept Sdn Bhd) were controlled by Alan and or his family. Defendant 15 (Ho Fatt Enterprise) erected defendant 22's factories at Teluk Panglima Garang ('TPG') and Meru. Defendant 15, 16 and 17 were parties to three deeds of settlement of debts ('three deeds of sale') by which defendant 15, 16 and 17 acquired the movable property of defendant 22, and to three deeds of resale ('three deed of resale') by

which the same said moveable property were resold to defendant 19. Defendant 18 was allotted shares in the capital of defendant 21. Defendant 20 (Titanic Capital Sdn Bhd) was controlled by defendant 4. Defendant 21 (AK Staple Fiber Manufacturing Sdn Bhd) and the defendant 22 were the joint venture companies. Defendant 23 was the sole proprietor of the defendant 15. Defendant 24 (AK Plastictech Recycling Sdn Bhd) was controlled by defendant 3 with Alan and defendants 3, 4, 9 and 10 as directors.

[3] In broad terms, the purport of the allegations against Alan was that he, in breach of shareholders' agreements and in breach of fiduciary duties, (a) seized control of the two joint venture companies by means of dubious resolutions, dubious appointments of additional directors, and illegitimate allotments of shares, and that he, with such control, (b) caused or procured s 218 notices, based on fictitious debts payable by defendant 22, to be served on defendant 22, and caused or procured defendant 22 to be wound up, and (c) stripped the assets of defendant 22 by means of three (sham) deeds of sale and three (sham) deeds of resale, and (d) removed and disposed the raw material.

[4] The purport of the allegations against defendants 2–24 was that they assisted and abetted Alan (see 446 of the appeal record). But it was not alleged that every other defendant assisted and abetted Alan in all and sundry. Paragraph 42 of the re-re-amended statement of claim averred that the defendant or defendants who assisted Alan would be 'particularized' — 'Alan … knowingly assisted and abetted by the other defendants as particularized below … ' (see 432AR).

[5] The joint venture was not disputed (see 329–334AR). Breach was disputed. At the end of the trial, the trial court awarded judgment to the plaintiffs against all the defendants (but not against defendants 10–12, as the claim against them was dismissed, or against defendant 22, as no order was made). Alan and defendants 14 and 19 were ordered to pay RM23,894,588.47 to the plaintiffs; defendants 14 and 19 were ordered to pay that sum on the basis of the alter ego principle. Defendants 2–9, 13, 15–18, 21 and 23–24 (other defendants) were ordered to pay RM17,601,051.57 to the plaintiffs, on the basis that they were liable in accordance with the principles stated by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Phillip Tan Kok Ming* [1995] 2 AC 378; [1995] 3 All ER 97. Alan and defendants 14 and 19 were also ordered to pay exemplary damages of RM2,000,000 to the plaintiffs. All in all, the plaintiffs were awarded sums that in the aggregate were considerably greater than the total sums claimed. '… to enable the beneficiary to recover … more than the loss flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation' (*Target Holdings Ltd v Redfern* [1995] 3 All ER 785, 796 per Browne-Wilkinson U). 'The award could not be of a sum greater than the amount claimed if the claimant specified a sum, and

if the court found for a greater sum than claimed the claimant needed to seek permission to amend before the amount found could be awarded' (McGregor on *Damages* (17th Ed), paras 44–027). 'Where a plaintiff has claimed a specific sum or has limited his claim to a specific sum, the court may not award greater damages unless the plaintiff obtains leave to amend his pleadings' (*Halsbury's Laws of England* (4th Ed), Reissue Volume 12(1) para 1153). Also rather strangely, the court below ordered the legal costs of defendants 10–12, who, as said, were vindicated and so should be paid costs by the plaintiffs, to be paid by Alan who had not brought the action against defendants 10–12.

[6] In relation to the incidental claim by Doran for title to a condominium (Parcel No 21-KC Kalista Tower) or return of the monies paid towards purchase thereof, Alan and defendants 3–4, 13 and 20 were ordered to pay RM591,059.50 to Doran.

[7] Alan and defendants 2–9, 13–19, 21 and 23–24 appealed. All 12 appeals were argued together. In view of the multiple appeals, we would refer to the respective appellants as Alan and or defendants as enumerated in the action below, and the respondents as the plaintiffs. Given that legal submissions were long and protracted, we would not venture to reproduce the legal submissions, except to underline that the other defendants were only concerned with the alleged loss of the cash injected (RM17,601,051.57) (defendants 3, 4, 13 and 20 were also ordered to pay RM591,059.50 to Doran, with respect to the incidental claim) and to record our grateful thanks to all learned counsel for their invaluable assistance which made our task that much easier, in particular, to read through a 14,500 folio appeal record. But of course, we would address the legal submissions, if the need be, in the course of these grounds and at the appropriate juncture.

[8] We should however impart at the onset that our approach in arriving at our decision is, (a) examine the final orders of the court below as opposed to the pleaded case, (b) inquire into the quantum of damages awarded against the other defendants, in that order, all without interference with any of the findings of facts by the court below, and (c) consider the liability of Alan and the other defendants. In the event of interference with any of the findings of facts by the court below, we would indicate so.

THE PLAINTIFFS' PLEADINGS AND PRAYERS

[9] The re-re-amended statement of claim could be paraphrased as follows:

[10] By a shareholders' agreement dated 9 July 2006 ('SA1'), PT of the first part, one Michael Parker of the second part, and Target Concept Sdn Bhd ('the 19th defendant') of the third part, entered into a joint venture to recycle plastic

waste into plastic flakes. PT entered into SA1 on behalf of Doran, and defendant 19 entered into SA1 on behalf of Alan. Inter alia, SA1 provided that a company would be acquired or incorporated to carry out that joint venture, and that the equity of that company would be held in the proportion of 51% (Doran), 15% (Parker) and 34% (defendant 19). Plascon Technologies Sdn Bhd (defendant 22) was that company incorporated or acquired for that purpose, with Alan as managing director.

[11] By another agreement dated 27 November 2006 ('SA2'), PT of the first part, Michael Tiong of the second part, and Alan of the third part, entered into a joint venture to process plastic flakes into plastic staple fibre. Inter alia, SA2 provided that a company would be incorporated or acquired to carry out that joint venture, and that the equity of that company would be held in the proportion of 50% (Doran), 20% (Alan), and 30% (Tiong). AK Staple Fibre Manufacturing Plascon Sdn Bhd (defendant 21) was that company acquired or incorporated for that purpose, with Alan as executive vice chairman, Doran as non-executive vice chairman and Tiong as managing director. At first, the equity of defendant 21 was held in the agreed proportion. That changed when Tiong sold his shares in defendant 21 to Doran in June 2007. Thereafter, the equity of defendant 21 was held in the proportion of 70% (Doran) and 30% (Alan). But when Parker withdrew from SA1 in September 2007, Doran and Alan agreed that defendant 21 would be a wholly owned subsidiary of defendant 22, and that the equity of defendant 22 would be held in the proportion of 70% (Doran through plaintiff 2) and 30% (Alan through defendants 14 and 19).

[12] Both SA1 and SA2 provided that the provisions of those agreements would prevail over the articles of the companies to be acquired or incorporated. Both SA1 and SA2 provided that shareholders would 'make up the initial paid up capital' of those joint venture companies (RM500,000 in the case of defendant 22, and US$1,000,000 in the case of defendant 21) and would 'provide shareholders loans' to the joint venture companies (in the aggregate of RM1,500,000 in the case of defendant 22, and in the aggregate of US$400,000 in the case of defendant 21). SA1 and SA2 capped the total amount of shareholders loans. Notwithstanding that cap, Doran nonetheless transferred RM17,601,051.57, by 15 tranches between 16 June 2006 and 22 February 2008, to defendants 22 and or 21. Through the third plaintiff, Doran also supplied raw materials to the alleged value of RM5,398,830.33 to defendants 22 and or 21.

[13] That Doran and Alan as partners, were to deal with the other with utmost faith, trust and confidence, and that Doran entrusted the entire management, assets and business affairs of defendants 22 and 21, plus funds of RM17,601,051.57 and said raw material, to Alan.

[14] Until February 2008, when Doran appointed one Phillip Finlay ('Finlay') as managing director of defendant 22, Alan had full operational control of defendants 22 and 21. Doran was fraudulently induced by Alan to agree to an amendment to article 90 of the memorandum of articles of defendant 22 that allowed Alan to gain control of the bank accounts of defendants 22 and to control the disbursement of Doran's investment. Unamended, the said article 90 required circular resolutions to be passed by all directors. On 28 July 2007, Alan misrepresented to Doran that an amendment to article 90 was urgently needed to facilitate the passing of company resolutions by directors present in Malaysia, as the banker's guarantee that was required for the clearance of a shipment of raw material could not be obtained without a company resolution. Alan further (mis)represented that the amended article 90 would only be used for the purpose of the said banker's guarantee, and that the consent of the plaintiffs would nonetheless be still required to validate all resolutions. Alan knew that his representation was false as the amended article 90 was used to pass other resolutions.

[15] But those allegations of misrepresentation, as a separate course of action, were abandoned by the plaintiffs (see p 2198AR). Instead, the plaintiffs relied on breach of shareholders' agreements and breach of fiduciary duties as the cause of action against Alan, and on 'knowing assistance' as the cause of action against the other defendants, based on the following acts or deeds by Alan alone and or by Alan assisted by the specified defendant/s:

(a) that Alan, by himself and knowingly **assisted and abetted by the defendants as specified below**, committed the following acts;

(b) that Alan and the unspecified defendants passed the hereinafter mentioned resolutions of defendant 22 without notice to the plaintiffs;

(c) that **defendant 7** 'devised' those resolutions;

(d) that on 18 April 2008, Alan and **defendant 3** executed a circular resolution (i) appointing defendant 7 as the company secretary in place of Tan Choon Keat, (ii) changing the registered office of defendant 22 to Teluk Panglima Garang, Selangor, (iii) appointing defendants 4 and 8–9 as additional directors of defendant 22, and (iv) appointing defendant 10 as the alternate director to defendant 3;

(e) that on 18 April 2008, Alan and **defendants 3–4 and 8–9** executed a resolution (i) authorising the company secretary to issue a members' circular resolution of defendant 21 to approve an ordinary resolution to allot 750,000 shares to defendant 18 and 1,250,000 shares to defendant 19 for RM0.01 for each share and payable within one year from the allotment, which allotment resulted in the dilution of Doran's interest in defendant 21 from being a majority interest that of a minority of 20% (ii) appointing Alan and one Tan Tsuen Huh as the authorised

representatives of defendant 22 to 'deal with Jiangyin Zhingrui Non-Woven Fabric Machinery Co Ltd in … all matters involving the purchase of machinery from China', and, (iii) appointing Messrs Selva Mookiah & Associates (defendant 7) and Messrs Tunku Munawwir, Chin and Solomon as advocates and solicitors for defendant 22;

(f) that on 25 April 2008, Alan and **defendants 3–4 and 8–9** executed a circular resolution changing the registered office to Klang, Selangor;

(g) that on 14 May 2008, Alan and **defendants 3–4 and 8–9** passed a resolution (i) appointing Alan, defendant 8 and Tan Tsuen Huh as the authorised representatives of defendant 22 to 'deal with all governmental … departments … and agencies', and, (ii) amending the operation of the banking accounts of defendant 22 to two signatories, from either Alan, defendant 3 or 4;

(h) that on 16 May 2008, Alan and **defendants 3–4 and 8–9** executed a resolution increasing the limit on defendant 22's bank guarantee to RM500,000;

(i) that on 20 May 2008, Alan and **defendant 7** passed a resolution acccepting the resignation of defendant 8 as a director of defendant 22;

(j) that on 28 May 2008, Alan and **defendants 3–4 and 9** executed a resolution appointing one Peter Anthony as an additional authorised representative of defendant 22 'to deal with governmental … departments … and agencies';

(k) that on 27 June 2008, Alan and **defendant 10** passed a resolution (i) ratifying the aforesaid resolutions, and, (ii) appointing defendant 9 to take charge of the factory premises at Meru and the material on site, without notice to Doran or Finlay;

(l) that on 4 July 2008, Alan and **defendants 4 and 9–10** passed a resolution (i) appointing Ferrier Hodgson MH Sdn Bhd as consultants of defendant 22, (ii) appointing defendant 9 as chief operations officer and as additional signatory of the banking accounts of defendant 22, (iii) appointing Richard Cheung Tai Yin as additional director and deputy executive chairman of defendant 22, (iv) authorising Alan to confer with Ferrier Hodgson on the allowance and fee payable to defendant 9, (iv) authorising defendant 9 to 'deal with and settle' with all creditors of defendant 22, especially creditors who had served s 218 notices on defendant 22, to deal with the raw materials and the claim by the forwarder KAS Line, and to deal with issues affecting the TPG land/relevant authorities, (v) terminating the rental arrangement with defendant 13 and New World Consultancy Sdn Bhd, (vi) appointing the firm of defendant 7 to defend actions filed by plaintiff 3, and, (vii)

authorising the issuance of a demand on Plus One Management Services Sdn Bhd for carrying out an investigation and audit on the records of defendant 22;

(m) that **defendant 7** was present as company secretary at the meetings held on 27 June 2008 and 4 July 2008;

(n) that Alan and **defendants 7 and 11–12**, appointed or procured the appointment of defendants 11–12 as directors of defendant 22, without notice to the plaintiffs;

(o) that Alan and **defendants 5–6, 14–17 and 19**, caused and or issued s 218 notices on defendant 22, based on fictitious debts due from defendant 22 (see para 42.4 at 437AR);

(p) that Alan and **defendants 5–7, 11–12, 14–17 and 19**, caused and or procured the winding up of defendant 22, based on fictitious debts, without notice to the plaintiff (see para 42.5 at 437AR);

(q) that Alan and **defendants 7, 11–12, 14 and 19**, appointed or procured the appointment of liquidators for defendant 22, without notice to the plaintiffs (see para 42.6 at 437AR);

(r) that Alan (**no other defendant was specified by the plaintiffs to have assisted or abetted Alan**):

(i) procured the expulsion of Finlay from the management of defendants 21–22;

(ii) relocated defendant 21 to new premises at Jalan Klang Banting, Teluk Panglima Garang and changed the name of defendant 21, without notice to the plaintiffs;

(iii) removed the assets of defendant 22 for the use thereof by defendant 21 at the new premises, without notice to the plaintiffs;

(iv) removed the raw materials supplied by the third plaintiff and the processed material, without notice to the plaintiffs;

(v) refused to provide management and financial documents to the auditors appointed by the plaintiffs to conduct a due diligence test on defendants 22 and 21;

(vi) made unauthorised payments towards rental of the land adjacent to the TGB site and 'redundant' generators, towards upkeep of factory premises, towards directors' fees for defendant 3 and Richard Cheung who was not a director of defendants 22 or 21, towards travelling expenses for Alan and defendants 2–3, 5 and 7, and towards entertainment expenses of Alan, defendant 5, Richard Cheung and one Mohd Faizal; and

(vii) caused defendant 22 to enter into three sham deeds of settlement of debts dated 21 July 2008 with defendants 15, 16 and 17, selling off the entire plant, machinery, furniture, office equipment and vehicles of defendant 22 at an undervalue price of RM1,043,000 to defendants 15–17 in 'extinguishment' of alleged sums due from defendant 22, without approval of the board or notice to the plaintiffs;

(s) that Alan caused defendant 22 to enter entered into three sham deeds of settlement of debt dated 21 July 2008, selling the entire plant, machinery, furniture, office equipment and vehicles of defendant 22 to defendants 15–17;

(t) that **defendants 15–17** entered into three agreement dated 15 October 2008, reselling the same said plant, machinery, furniture, office equipment and vehicle of defendant 22, all to 'hive off' the plaintiffs' investments to alan, either directly or through defendants 13, 21 and or 24;

(u) that Alan and **defendants 14 and 19** waived the return of their purported investment or alleged debt due from defendant 22 as a condition for the deeds of settlement and resale agreements;

(v) that **defendants 18, 19 and 22** entered into a shareholders' agreement without the consent of or notice to the plaintiffs;

(w) that **defendants 18 and 19** procured the transfer of defendant 22's shares in defendant 21 without the consent of or notice to the plaintiffs;

(x) that the defendants (no particular defendant was specified) assisted and or abetted defendants 21–22 to commit those acts against defendants 21 or 22; and

(y) that Alan and **defendant 20**, who were his trustees in his purchase of a condominium, failed and or refused to respond to his demands for delivery of title to the said condominium.

(the above allegations will be respectively referred to as allegation (a), (b), (c) etc)

(the other defendant/s implicated in relation to the particular allegation is/are highlighted in **bold**)

[16] On the basis of the aforesaid allegations, the plaintiffs sought (a) declarations to declare all said resolutions as void and of no effect (see 441–445AR), (b) an order to set aside the voluntary winding up of defendant 22, and, (c) a declaration to declare the three deeds of sale and three deeds of resale as void and of no effect.

[17] In addition, the plaintiffs sought the following monetary reliefs:

Prayer 10. For an order that the Defendants, individually or collectively, account for the monies and assets of the Plaintiffs held and received by them.

Prayer 11. For damages of RM26,720,971.85 arising from:-

Breach of shareholders' agreements dated 9.7.1006 and 27.11.2006;

Breach of fiduciary duties owed by the 1st Defendant to the Plaintiffs;

The 2nd to 19th, 23rd and 24th Defendants' knowing assistance and abetment of the 1st Defendant in his breaches of the shareholders agreements and his fiduciary duties;

For the 1st Defendant's fraudulent misrepresentation [since abandoned]; and

The 2nd to 19th, 23rd and 24th Defendants' knowing assistance and abetment of the 1st Defendant his fraudulent misrepresentation [since abandoned]

Prayer 12. For an order that the 1st and 20th Defendants account for the property known as Parcel No 21-KC Kalista Tower, Tiffini Kiara Project beneficially owed by the 1st Defendant.

[18] To the facts asserted in the re-re-amended statement of claim, we should add that Finlay, who was Doran's appointee, was in charge of joint venture operations from February 2008 to June 2008, that the plant and machinery of defendant 22 were moved from the factory at TPG to the factory at Meru on the instructions of Doran, that the same said plant and machinery were later moved back to the factory at TPG, and that that removal of the plant and machinery from the factory at Meru to the factory at TPG constituted the basis of the complaint that Alan removed and sold the plant and machinery of defendant 22 to benefit himself.

THE FINAL ORDERS, THE PLAINTIFFS' PLEADINGS AND THE PRAYERS FOR RELIEF OR REMEDY

[19] At this juncture, let it be assumed that the plaintiffs had made out all allegations as pleaded. But first, let it be reiterated that the function of pleadings 'is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them. See *Esso Petroleum Co Ltd and another v Southport Corporation* [1955] 3 All ER 864, (*The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 per Raja Azlan Shah FJ, as His Royal Highness then was) '… to give notice of the case which has to be met by the opposing party' (*Kementerian Pertahanan Malaysia & Anor v Malaysian International Shipping Corp Bhd & Ors* [2007] 5 MLJ 393 per Zaleha Zahari JCA, as she then was, delivering the judgment of the court). 'The function of pleadings is to give fair notice of the case which has to be met

and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Thus, a party is bound by his pleadings and his case is confined to the issues raised in the pleadings unless and until they are amended. A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail. It follows that the pleadings enable the parties to decide in advance of the trial which evidence will be needed … The matters in issue are determined by the state of pleadings at their close' (*Halsbury's Laws of Malaysia* Vol 1 para 10.3.129).

[20] 'The primary function of the statement of claim is to plead reasonable cause of action against the defendant. Therefore, it must contain all material facts on which the plaintiff relies for his claim. It must also disclose the legal liability of the defendant. By this, it is essential to establish a linkage between material facts pleaded in the statement of claim and the substantive right which the plaintiff claims or seeks to enforce against the defendant. Thus, in a case where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, and where there is an allegation of negligence, facts must set out showing the existence of a duty to take reasonable care owed to the particular person or class of person and that the duty was disregarded' (*Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & anor* [1995] 2 MLJ 276, per James Foong J, as he then was).

[21] The relief claimed must surface from the pleaded facts. '… there must be an inner connection, a legal nexus, between the facts relied on and the relief or remedy claimed' (*Pleadings, Principles and Practice* by Sir Jack Jaacob and Iain S Goldrein at p 71). Relief will not be granted if not sought by the prayers (see *Charles Henry Palmer v Edwin John Lark and Edith May Lark* [1945] 1 All ER 355, where the interest claimed, which was not pleaded, was not granted by the court). 'Any departure from the cause of action alleged or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended'. They should be amended in fact (*London Passenger Transport Board v Moscrop* [1942] 1 All ER 97 per Viscount Maugham). 'It is a well established principle of law that a case must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment' (*Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71 per Buttrose J). Accordingly, in *Superintendent of Lands and Surveys Department Bintulu Division & Anor v Agi ak Bungkong & Ors* [2012] 1 MLJ 335, where the trial court went beyond what was claimed in the statement of claim, Abu Samah JCA held, in delivering the judgment of the court, that such judgment is contrary to pleading, untenable in law and liable to be set aside.

[22] A party should not be put to surprise, lest of all, by the court. 'The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance' (*Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 per Sharma J). 'It is not open to the (court) to fly off at a tangent … and disregard the pleadings in order to reach a conclusion that he might have thought is just and proper' (*Kay Synergy Sdn Bhd v Malayan Banking Bhd* [2007] 6 MLJ 159 per VT Singham J). 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …' (*Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 per Lord Diplock, cited with approval by the former Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428).

[23] Courts must defer to those principles of pleadings. But when we dissected the statement of claim, to get to the bottom of it, and then put it back together, to look at it again as a whole, we found, with respect, that the court below had sallied off the pleaded case when it made its final orders, for those final orders against the other defendants were either not supported by pleadings, not sought by the prayers, or bore semblance to the prayers.

[24] Alan aside, the pleaded case against the other defendants was that they were accessories. But it was not the pleaded case that every other defendant was an accessory in every instance, and or that every other defendant was liable to answer to Doran for his total investment (cash injected, raw materials and condominium). Only Alan was implicated in the matter of the raw materials. And only Alan and defendant 20 were singled out by the plaintiffs in the matter of the condominium.

[25] It was only with respect to the alleged loss of the cash injected that the other defendants were implicated, as accessories. But even then, it was not alleged that all other defendants were accessories in *pari delicto*. It was the pleaded case that the alleged loss of the cash injected was caused, not by a single breach, but by a mixed bag of breaches(see allegations (a)–(y)). Only Alan was alleged to have made those alleged unauthorised payments. Hence, only Alan could be held to account for those alleged unauthorised payments. Only Alan was alleged to have dealt with the Chinese machinery manufacturer (Jiangyin

Zhongrui Non-Woven Fabric Machinery Co Ltd). Hence, only Alan could be held to account for the machinery. Only Alan and defendant 10 were implicated in the matter of the appointment of defendant 9 as manager of the factory at Meru. Hence, only Alan and defendant 10 could be held to answer for that. Only defendants 5, 6, 13, 15–17 and 23 were implicated as accessories in the matter of the three deeds of sale and three deeds of resale. Hence, only defendants 5, 6, 13, 15–17 and 23 could be liable as accessories on the matter of the three deeds of sale and three deeds of resale but not in the matter of the unauthorised payments which concerned only Alan and no other defendant. In connection with the unauthorised payments, three deeds of sale and three deeds of resale, and machinery, all other defendants not implicated could not be liable as accessories, for it was not pleaded that they were accessories in any one of those transactions. We have not, as yet, entirely listed the instances where the other defendants were not implicated and so could not be held liable for the loss occasioned by that particular breach. For that, we fall back on our summary of the allegations. Suffice it to say that it was the pleaded case that there were different accessories for different breaches (again, see allegation (a)–(y)).

[26] The point is this. No one other defendant was an accessory in every alleged instance of breach. So even if it were proved that the other defendants were accessories as pleaded, it remained that the court below could not order any one accessory to make good the entire cash injected. An accessory is liable for the loss occasioned by his 'knowing assistance', to the same extent as the principal, but only with respect to the breach he knowingly assisted. In the case of accessory liability, it is necessary that the accessory knows he was dealing with a person standing in a fiduciary relationship to another and owed duty to act in good faith in relation to that other in the dealing (see *Menno Leendert Vos v Global Fair Industrial Limited & ors* [2009] HKCU 1910). The court below could not hold an accessory liable for what was not occasioned by his 'knowing assistance'. The instant facts were very different from *Royal Brunei Airlines*, where the defendant was the only accessory and also the alter ego of the principal. In the instant case, there were, allegedly, different accessories and different breaches. So even if it were proved that the other defendants were accessories, yet it remained that the court below must proceed onto the next stage and access the loss occasioned by the 'knowing assistance' of an accessory on an individual basis (see *Kerry v Carter* [1969] 1 WLR 1372 at p 1376, where Lord Denning MR said that the Court of Appeal will interfere 'where the judge has gone wong on principle or is shown to have misapprehended the facts; but, even if neither is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly'). But that was not done. Rather, the approach of the court below was this — the amount of the cash injected was the measure of the alleged loss;

any accessory must make good the cash injected. That approach was reflected at para 119 of the judgment below (119JB) — 'I propose in the next part of my judgment to examine the role played by each of the defendants in the breach by (Alan) … and rule on the liability of each of the remaining defendants apart from (defendants 14 and 19)'. The cash injected was not seriously disputed. But with respect, the cash injected was not the measure of the alleged loss occasioned by the other defendants or by any one of them. Proof of the cash injected was proof of that and no more.

[27] *'Actori incumbent probatio'.* There were no short cuts. To hold any accessory to account, the plaintiffs must prove the loss occasioned by the 'knowing assistance' of the accessory on an individual basis. But the court below just held all other defendants equally liable without distinction as to whether the alleged loss of the cash injected was occasioned, and if so, to what part or portion, by the 'knowing assistance' of the individual accessory. All other defendants were ordered to pay RM17,601,051.57 (the cash injected) without distinction. 'One punishment was meted out'. That was an unjust result, for (a) defendants 2–4, 7–9, 18, 21 and 24 were ordered to make good the unauthorised payments, the loss of the movable property, and the machinery, when it was not the pleaded case that that had anything to do with them, (b) defendants 5, 6, 13, 15–17 and 23 were ordered to make good the unauthorised payments, and the machinery, when it was not the pleaded case that that had anything to do with them, and, (c) all other defendants were in effect ordered to make good on the 'knowing assistance' of others, when it was not the pleaded case that the 'knowing assistance' of the others had anything to do with them at all. In the upshot, we find that even if it were proved that the other defendants were accessories as pleaded, the order that the other defendants pay RM17,601,051.57 could not stand, for on the pleaded case they were not so liable (see *Victoria Street Apartments Ltd v Suren Sharma* [2012] NZHC 2, where it was held that a defendant without proper notice through proper pleading alleging accessory liability could not be treated as having that liability). In relation to the order that defendants 3, 4 and 13 do pay RM591,059.50 to Doran, that could also not stand, for it was not pleaded or prayed in the reliefs sought that defendants 3, 4 and 13 do account for the condominium or its purchase price.

[28] Given the state of the pleadings and prayers, we could not therefore support those final awards against defendants 2–9, 13, 15–8, 21, 23 and 24, and against defendants 3, 4 and 13 with respect of the condominium, for those awards were not in accord with the pleaded case.

PROOF OF LOSS OCCASIONED BY KNOWING ASSISTANCE?

[29] Notwithstanding the failure by the court below to assess the loss

occasioned by an accessory on an individual basis, we should nonetheless inquire, so as to do justice to all, as to whether there was proof of the loss occasioned by the 'knowing assistance' of the other defendants or any one of them.

[30] At this juncture, let it still be assumed that the plaintiffs had made out all allegations as pleaded. But as said, proof of liability was not proof of loss occasioned by the other defendants. Chalk is not cheese. On the facts, the quantum of investment was not the quantum of loss occasioned by the knowing assistance of the other defendants. The loss must be occasioned by the 'knowing assistance' of the other defendants. In contract, 'if a plaintiff seeks full compensatory damages, then actual loss must be proved' (see *Erie County Natural Gas & Fuel Co Ltd v Carroll* [1911] AC 105). In equity, 'applying the maxim *aequitas sequitur legem* (meaning 'equity follows the law'), the rule governing assessment of equitable damages … is that equity follows the common law principles of assessment' (*Johnson v Agnew* [1980] AC 367, per Lord Wilberforce).

[31] On the application of common law principles in the assessment of equitable damages, in *Target Holdings* at p 792, Lord Browne-Wilkinson, who delivered the opinion of the House of Lords, enunciated as follows:

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at p 39 per Lord Blackburn). Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. *Under both systems liability is fault based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong*. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. On the assumptions that had to be made in the present case until the factual issues are resolved (ie that the transaction would have gone through even if there had been no breach of trust), the result reached by the Court of Appeal does not accord with those principles. Redferns as trustees have been held liable to compensate Target for a loss caused otherwise than by the breach of trust. I approach the consideration of the relevant rules of equity with a strong predisposition against such a conclusion. (Emphasis added.)

[32] The approach of the plaintiffs was that the joint venture failed because of Alan's breach of SA1 and SA2 and breach of fiduciary duties, that failure of

the joint venture resulted in the loss of their entire investment, and that Alan, who caused the failure of the joint venture and their loss, must make good their total investment. We would address that approach when we focus on the case against Alan. But in relation to the other defendants, that approach had a basic flaw. For unlike Alan who was implicated in all and sundry, the other defendants were not. As said, on the pleaded case, no one other defendant had knowingly assisted Alan to the extent as could have occasioned the loss of the whole of the cash injected. That was even recognised by the court below who held that 'the liability of an abettor, unlike in the alter ego cases is not co-extensive but independent of the principal … the liability of the accessory may be less than that of the principal' (see 118JB). Hence, no one other defendant could be held to make good the whole of the cash injected. And that — no one other defendant could be held to make good the whole — was universal truth, so to speak, to anchor the assessment of damages, with respect to the other defendants. Another fact to be taken into account in a proper assessment was that the machinery and unauthorised payments, which only concerned Alan, could not be foisted onto any of the other defendants. Only defendants 5, 6, 13, 15–17 and 23 could be held to account for losses suffered on account of the three deeds of sale and three deeds of resale. Only that particular other defendant/s who assisted the particular breach could be held to account for the consequent loss. '… liability is fault based … (a) defendant is only liable for the consequence of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong' (see *Target Holdings*, per Lord Browne-Wilkinson at p 792). 'A wrongdoer is only liable for the consequences of his being wrong and not for all the consequences of a cause of action' (*Swindle and ohers v Harrison and another* [1997] 4 All ER 705 per Mummery LJ). 'In a case where the trustee has committed a series of breaches some only of which have been assisted by the defendant, the defendant's liability is limited to the loss caused by those of the breaches which he has assisted' (*Grupo Torras SA and another v Sheikh Fahad Mohammed Al Sabah and others* [1999] All ER (D) 176). 'Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law … in other words, the courts should look to the harm suffered from the breach of the given duty and apply the appropriate remedy' (*Hodgkinson v Simms* 117 DLR (4th) 151, per La Forest). Hence, only defendant 7 could be held to account for 'devising' those impugned resolutions. Those other defendants who had not 'devised' or passed those impugned resolutions could not be held responsible. The other defendants who were not implicated in the particular breach could not be held to pay for loss occasioned by that breach. A proper assessment of damages should take those factors at least into account, by appropriate deductions from whatever loss proved by the plaintiffs. But then again, for any assessment of damages to

be undertaken, the overall loss must first be proved. It was a multi-million suit. The stakes were high. There was no place for guess work. Loss must be proved and assessed against each and every accessory. '… it is necessary to show that the loss suffered has been caused by the relevant breach … Liability is not unlimited. There is no equitable by-pass of the need to establish causation' (*Swindle and others v Harrison and another* at p 733 per Mummery LJ). But there was no proof of the loss occasioned by those three deeds of sale, of the fair market value of the movable property, of the quantum of unauthorised payments, or of the overall loss suffered by the plaintiffs on account of the knowing assistance of the accessories. Not surprisingly, therefore, there were no findings by the court below on the loss occasioned by any one accessory, let alone each and every other defendant.

[33] Since the loss occasioned by the 'knowing assistance' of the other defendants could not be proved, it should follow that full compensation could not be awarded. Yet with respect, the court below ordered every other defendant to pay RM17,601,051.57 when the alleged loss that could have been occasioned by the knowing assistance of all other defendants, who even together, could not, on the pleaded case, ever extend to that amount. As said, no one other defendant was alleged to have assisted Alan in the matter of the unauthorised payments and machinery, and the loss thereof, which could not be attributed to all accessories, must therefore be deducted from the alleged overall loss of RM17,601,051.57. Only defendants 5, 6, 13, 15–17 and 23 were implicated in the matter of the three deeds of sale and three deeds of resale. The loss occasioned by those three deeds of sale and three deeds of resale, which could not be attributed to the rest of the other defendants, must also, in relation to them, be deducted from the alleged overall loss of RM17,601,051.57. All said, no one other defendant could be liable to the extent of RM17,601,051.57, that is, even if it were true that all other defendants were jointly and or severally liable for the knowing assistance of all. It could not be clearer that the order to all other defendants to pay RM17,601,051.57 could not be sustained, for no such loss or any other loss had been proved against the other defendants or any one of them.

[34] RM17,601,051.57 as the quantum of damages was arbitrary, and wholly out of proportion. Take for instance the case of Alan's father (defendant 2), who the court below held had received RM25,000 from defendant 22. The court below further held that defendant 2 was liable as an accessory on account of the fact that he was a director and major shareholder of defendant 14 who was the ultimate beneficiary of the sale of the movable property of defendant 22. The court below held that the role of defendant 2 was minimal, it being confined to the three deeds of sale (see 159–160JB). But if that were so, then defendant 2 could only be liable to answer for the loss occasioned by those three deeds of sale plus the RM25,000 and no more.

[35] In the case of Alan's mother (defendant 3), the court below held that she had received RM25,000 as director's fees and RM10,000 as transport allowance from defendant 22. The court below further held that although her entire role was limited to the passing of the impugned resolutions of April/May 2008, yet she implicitly allowed Alan to take physical control of the assets of defendant 22 at the Meru factory and to lodge a false insurance claim for loss of the plant and machinery of defendant 22 by fire (see 139–141JB). That was the gist of all that the court below held against defendant 3. But the order against defendant 3 to pay was not confined to the three deeds of sale, 'false fire claim', and director's fees/transport allowance (for the record, the said fire claim, which was not a pleaded issue, was amicably settled by the payment of RM1m to defendant 24 — see 14431AR).

[36] In the case of Alan's wife (defendant 4), the court below found that she signed all impugned resolutions of April/May 2008 that led to and or coincided with (a) defendant 13's acquisition of the movable property of defendant 22, (b) the lodgment of the said false insurance claim, (c) the departure of Finlay from management of defendant 22, (d) the appointment of defendant 7 as chief operating officer of defendant 22's factory at Meru, and (e) the deprivation of Doran's rights as a shareholder of defendant 22 (see 142JB). But the order to defendant 4 to pay was not confined to those impugned resolutions.

[37] Defendants 5, 6 and 23 and the companies they allegedly controlled (defendants 15–17) were also ordered to pay more than what was found by the court below, which had to do only with their 'knowing assistance' in the three deeds of sale and three deeds of resale of the movable property of defendant 22.

[38] In the case of defendant 7, the court below held that defendant 7 was involved in the planning and execution of Plans A and B (the court below held that Alan had three contingent plans in place ('Plans A, B, and C') to defraud the plaintiffs):

> Since it is my finding that Selva was inextricably involved with Kuan in the planning and implementation of Plans A and B and since these plans involved Kuan acting in breach of his fiduciary duties to Doran and the two joint venture companies, to Selva's knowledge, it must follow that Selva is liable to the plaintiffs for aiding and abetting Kuan (see 137JB).

[39] According to the court below, Plans A and B were devised by Alan to appropriate Doran's interest in defendants 21 and 22 (see 74JB). But defendant 7 was ordered to make good the machinery, the unauthorised payments, and the alleged loss sustained by reason of the three deeds of sale and three deeds of resale.

[40] Suffice it to say that the rest of the other defendants were also ordered to make full restitution of the cash injected, when their 'assistance', as found by the court below, was limited, (a) in the case of defendants 8, to the impugned resolutions, (b) in the case of defendant 9, to the impugned resolutions, (c) in the case of defendant 13, to the movable property of defendant 22, (d) in the case of defendant 14, to the s 218 notice and winding up of defendant 22, (e) in the case defendant 19, to the s 218 notices, the winding up of defendant 22, the appointment of liquidators for defendant 22, the three deeds of sale and three deeds of resale, and the transfer of defendant 22's shares in defendant 21, (f) in the case of defendant 18, to the shareholders' agreement and transfer of defendant 22's shares in defendant 21, and, (g) in the case of defendant 19, to the s 218 notices, the winding up of defendant 22, the appointment of liquidators for defendant 22, the three deeds of sale and three deeds of resale, and the transfer of defendant 22's shares in defendant 21.

[41] But that was not nearly half as bad as in the case of defendants 21 and 24, where the court below ordered defendant 24 to pay RM17,601,051.57 to the plaintiffs, when no cause of action was pleaded against defendant 24 and there was no jurisdiction as such to grant relief (see *Guaranty Trust Company of New York v Hannay & Company* [1915] 2 KB 536, where Buckley LJ said that if there is no cause of action, there is no jurisdiction to make a declaration), and when no facts of any involvement were made out against defendant 21.

[42] It was a total *faux pas* to hold defendants 21 and 24 liable for the alleged loss of the cash injected. Defendant 24 was never a defendant in the true sense in the action. Defendant 24 'was (only) added during the course of the injunction proceedings when (Alan) identified it as 'one of his businesses' and identified it as the party which made the claim for a fire which destroyed the factory in Teluk Panglima Garang ('TPG')' (see 10JB). Regardless of that, the court below held 'that (defendant 24) assisted (Alan) in the implementation of his Plan C … in putting forward the fraudulent claim against the insurers in respect of the assets of (defendant 22) after the relocation of these assets at the TPG site' (see 148JB), and that 'under Plan C, the three insured were (defendants 13, 21, and 24)' (see p 108JB). The court below held that '(defendant 24 was) liable for (Alan's) breach of his fiduciary duties in putting forward a fraudulent claim in respect of the assets of (defendant 22)'. In another part of its grounds, the court below repeated its finding 'that (defendant 24) assisted (Alan) in the implementation of his Plan C … in putting forward the fraudulent claim against the insurers in respect of the assets of (defendant 22) after the relocation of these assets at the TPG site. To the extent that the directors of (defendant 24) are one and the same persons whom I have already held to be parties who were assisting and aiding (Alan) in the breach of his fiduciary duties to Doran, it follows that (defendant 24 was) liable

for (Alan's) breach of his fiduciary duties in putting forward a fraudulent claim in respect of the assets of (defendant 22)'.

[43] It was held that defendant 24 assisted Alan to put up a false fire claim. But in the light of the amicable settlement of the fire claim (see 14431AR), that finding that the fire claim was fraudulent would not stand at all. In any event, the fire claim was not a pleaded issue and so should not have been countenanced (*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770). The whole exercise to find liability or otherwise of defendant 24 was an exercise in futility. The claim against defendant 24 ought to have been dismissed then and there.

[44] As for defendant 21, the only allegation that concerned it was that the three deeds of resale 'were sham transactions designed to hive off the plaintiffs' investments to (Alan), either directly or through defendants 13 and or 21 and or 24' (see para 42.14 at 439AR). In that pleading, it was alleged that defendants 13 and or 21 and or 24 assisted Alan to remove the movable property of defendant 22. It was the finding of the court below that the three deeds of sale and three deeds of resale were sham transactions devised by Alan to remove the movable property of defendant 22. But it was also undisputed evidence that defendant 21 was not involved in any of the three deeds of sale and three deeds of resale, and that it was defendant 13 who was the end purchaser of the movable property. So even if it were true that the three deeds of sale and three deeds of resale were sham transactions, yet it remained that since it was defendant 13 and not defendants 21 or 24 who were involved in the three deeds of resale, that defendant 21 could not therefore have assisted Alan in the removal of the movable property of defendant 22. It was so clear that the only allegation that concerned defendant 21 (see para 42.14 at 439AR) was disproved by established evidence.

[45] As a matter of fact, in its consideration of the liability of defendants 6, 13, 15–17 and 23–24 (see 120–127JB), the court below did not find that defendant 21 was involved in the removal of the movable property of defendant 22:

> It is my finding that Tony Leong, Liberty Equity, Ho Fatt, Techfident, Pro-Management and Kar Poh assisted in one way or another in the implementation of this part of Kuan's Plan B. The contractor companies entered into three settlement deeds purportedly by way of contra with Plascon Technologies. Under these settlement deeds, the contractor companies were supposed to have acquired possession and ownership of all the assets of Plascon Technologies with the consideration being the set off of the debts purportedly due from Plascon Technologies to these three defendants. The set off debt being a discounted sum from the aggregate of 1.2 million stipulated in the 218 notices (see 121JB).

[46] There was no finding of the primary fact that defendant 21 was involved in the removal or sale of the movable property of defendant 22. Without that primary fact, the claim against defendant 21 had nothing to stand on, and ought therefore to have been dismissed then and there.

[47] With respect, we could not support the award of RM17,601,051.57 against defendants 2–9, 13, 15–18, and 23. Whether we could support any other award would be answered shortly, after our consideration of accessory liability, if any.

[48] But as for defendants 21 and 24, without further ado, we unanimously allow their appeals with costs for the reasons given hereinbefore.

BREACH OF FIDUCIARY DUTY?

[49] Breach of fiduciary duty was the *sine qua non* of the entire complaint. Without breach of fiduciary duty, the plaintiffs would have no case against Alan or against the other defendants. As between participants to a joint venture, that there is a fiduciary duty was first said in Singapore in *Haw Paw Brothers International & anor v Jack Chiarapurk & ors* [1991] 2 MLJ 428, where Chao Hick Tin J, as he then was, said as follows:

> I will now deal with the claim based on a breach of fiduciary duty as regards certain confidential information. In the light of the brief facts set out above it is quite clear that the plaintiffs and the first three defendants are in a joint venture, a venture to manufacture, promote, sell and develop the Tiger Brand products, including the Tiger Balm products, for mutual advantage and profit … I am inclined to think that there is a fiduciary relationship between the participants to the joint venture arrangements or there is at least an arguable case for it. The establishment of such a relationship was put in this way by Dawson J in *United Dominions Corp Pty v Brian Pty Ltd* (1985) 59 ALJR 676 at p 681:
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> > Although the relationship between participants in a joint venture which is to a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another. Of course, in a partnership the parties are agents for each other and this may constitute a separate reason for the fiduciary character of a partnership. There may be no such agency between participants in a joint venture but, as Dixon J pointed out in *Birtchnell v Equity Trustees* … even in a partnership it is really the mutual confidence between partners which imposes fiduciary duties upon them and the same confidence may, in appropriate circumstances, be found to exist between participants in a joint venture.

[50] *Brian Pty Ltd v United Dominions Corpn Ltd* [1983] 1 NSWLR 490 which was put forward in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ

474 to support the proposition that a fiduciary relationship is established between the participants of a joint venture agreement was accepted as such by the former Supreme Court. After a review of the authorities, Jemuri Serjan CJ (Borneo) said:

> He supported his proposition by citing the Australian Supreme Court case of *Brian Pty Ltd v United Dominions Corp Ltd* [1983] 1 NSWLR 490. Samuels JA at p 506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p 496 has this to say on this subject:
>
> > Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device.
>
> In the High Court of Australia case of *Jenyns v Public Curator (Q)* (1953–54) 90 CLR 113 Dixon CJ, McTiernan and Kitto JJ have this to say at p 133:
>
> > We are not here dealing with any of the traditional relations of influence or confidence — solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and cestui que trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.
>
> The judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Anor v The Equity Trustees, Executors and Agency Co Ltd & Anor* (1928–30) 42 CLR 384 Dixon J at p 407 explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:
>
> > The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v Smith* (1890) 15 App Cas 223 at p 225 (1886) 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v Stewart* (1881) 6 App Cas at p 79). The subject matter over which the fiduciary obligations extend is determined by the character of the venture of undertaking for which the partnership exists, and this is to be ascertained, not merely from the

express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm. Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties.

That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society Oranje Incorporated v Kuys & Anor* [1973] 2 All ER 1222 at p 1226. Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:

> This was said in the context of a partnership but the principle must be of general application.

We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980 entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one.

[51] Subsequent to *Newacres* (1991), in *Chooi Siew Cheng v Lucky Height Development Sdn Bhd & anor* [1995] 1 MLJ 513, Cheong Siew Fai FCJ, as he then was, affirmed that joint venturers may owe certain fiduciary duties to one another, but that the existence of such duties does not necessarily make them partners under the Act (for difference between joint venture and partnership, see *Australian Business Law* (19th Ed), by Paul Latimer paras 9–150), and in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & anor* [1999] 2 MLJ 481, Gopal Sri Ram JCA, as he then was, too affirmed that participants to a joint venture stand in a fiduciary position to each other:

> It is settled that parties to a joint venture stand in a fiduciary position to each other. The scope or extent of the duties that joint venturers owe each other depends upon varied considerations. These would encompass (but are not limited to) the nature of the particular joint venture, its subject matter, the relevant documents passing between the parties, including any agreement upon which the particular venture is founded and the attendant circumstances. Here, as in other areas of equity jurisprudence, there is no substitute for a meticulous examination of the facts. If authority is required for these propositions it may be found in the decision of the Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474.
>
> It is axiomatic that mutual trust and confidence between joint venturers is essential for the proper working of the relationship. And where, as in the present instance, there is reliance by one joint venturer upon the skill or expertise professed by the other in the subject matter of the enterprise, there is, in my judgment, a duty upon that other to use his best endeavours to ensure the success of the venture. Equity will, in my view, imply such an obligation in the absence of an express term in the particular joint venture agreement.

[52] Two subsequent authorities (*Newacres Sdn Bhd v Sri Alam Sdn Bhd*

[2000] 2 MLJ 353 and *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544) reaffirmed that the relationship between joint venturers is fiduciary. That the relationship is fiduciary is therefore settled.

[53] Since it was common ground in the court below that Alan and Doran were involved in a joint venture (see 53JB), then Alan owed fiduciary duties to Doran. Even so, it was nonetheless argued that SA1 and SA2 ceased to have effect by reason that the original agreed share structure of the joint venture companies was never carried through, and that there could not be breach of shareholders' agreement that had lapsed. Our short answer is that the joint venture was nonetheless set into motion and implemented, quite unaffected by changes to the shareholdings in the joint venture companies that were brought about by the withdrawal of shareholders, which were all but admitted by Alan in his statement of defence (see 329–324AR). The fiduciary obligations of Alan should not be viewed from just SA1 and or SA2 but also from the course of dealings pursued and the conduct of the parties. Anyway, 'a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach agreement upon the consensual terms which are to govern the arrangement between them' (see *United Dominions Corp Pty v Brian Pty Ltd*). On the facts, it was so clear that there was a joint venture. The joint venture companies were testament to that. Joint venturers hold all assets committed to the joint venture as tenants in common (see *Australian Business Law* paras 9–140 and 9–150). The scope of Alan's duties also encompassed due compliance with the provisions of SA1 and SA2, in particular, to the provisions on the agreed share structure and agreed composition of the board, with Doran in the majority. It was the finding of the court below that Alan breached those fiduciary duties, when he took control of the management and the finances of defendants 21 and 22, took physical control of the factory at Meru, expelled Finlay and James Baker from the factory at Meru, stripped the factory at Meru of plant and machinery and transferred them back to the factory at TPG to enable Kuan and his team to commence operations there, appropriated and sold the processed material of some 430 metric tons located in the factory at Meru, arranged for the delivery of the staple fibre machinery originally purchased by defendant 22 from Jiangyin Zhongrui Non-Woven Fabric Machinery Co Ltd to be delivered to the factory at TPG, transferred all the moveable property of defendant 22 including all the office equipment and cars to Kuan's own business premises at the Sri Hartamas office, seized the raw materials and appropriated the sale proceeds (see 96JB). We could say that Alan broke the mould when he took control of the joint venture companies and then dealt with the joint venture assets, or permitted them to be dealt with, without the consent of Doran. And when Alan did that, he breached all confidence and trust. It was not so much the resolutions amending article 90 or appointing new officers of defendant 22 that were that objectionable. It was those resolutions appointing new and additional directors and allotting new shares that were wholly indefensible.

The agreement between the joint venturers was that 'Doran's nominees on the board shall be in the majority' (see 3703AR) and that defendant 22 would be the holding company of defendant 21. But that agreement was breached when three additional directors, who were not nominees of Doran, were appointed on 18 April 2008 (see 4853AR) and when 2 million shares in the capital of defendant 21 were allotted to defendants 18 and 19 on 18 April 2008. When those resolutions were passed, Doran lost all control of the joint venture companies and his investment. That was the foremost breach of trust and confidence by Alan. Various reasons were proffered for those resolutions. But those reasons were not a defence, for those resolutions which took control away from Doran could not be passed without the consent of Doran, no matter what the circumstance. There was just no merit in the argument that those resolutions had no effect on Doran and or the other plaintiffs. It was argued that Doran with his majority shareholding in defendant 22 could undo all impugned resolutions. That could well be so. But Doran could not undo the breach of trust and confidence. Alan must undo the breach of trust and confidence and make good the loss of the assets of the joint venture companies. The only question is the quantum of damages.

ACCESSORY LIABILITY?

[54] Even on the assumption that the plaintiffs had made out all allegations as pleaded, it panned out that the final orders against the other defendants were bad and that the quantum of damages had not been made out. But would it also pan out that 'knowing assistance' was not made out? To answer that, it could not be assumed anymore that 'knowing assistance' had been made out.

[55] 'Knowing assistance' is one of two types of third party liabilities under trust law, established in *Barnes v Addy* (1874) LR 9 Ch App 244, and based on the following dictum of Lord Selbourne LC:

> (The responsibility of a trustee) may no doubt be extended in equity to others who are not properly trustees, if they are found … actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But … strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

[56] As a general rule, there must be a breach of trust or fiduciary duty by someone other than the defendant, the defendant must have helped that person in the breach, and the defendant must have a dishonest state of mind.

[57] In *Royal Brunei Airlines* at p 390; 107, in its overall conclusion of the

accessory liability principle, the judicial committee of the Privy Council (appeal from the Court of Appeal, Brunei) clarified, per Lords Nicholls, that while dishonesty is a necessary ingredient of accessory liability, it is not necessary that in addition, the trustee or fiduciary was acting dishonestly, and that in the context of the accessory liability principle, acting dishonestly or with a lack of probity, is based on an objective standard.

> The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific … Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advice the trustee of the risk but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

[58] The above dictum was followed in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332, where it was held by James Foong J, as he then was, that honesty or dishonesty must be viewed objectively. The only other Malaysian case to have applied the objective test as formulated in *Royal Brunei Airlines* was *Pharmmalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel & Ors* [2004] 7 CLJ 465.

[59] In *Twinsectra Ltd v Yardley* [2002] UKHL 12, Lord Hutton (Lord Hoffman with him) interpreted Lord Nicholls in *Royal Brunei Airlines* to have articulated a combined test; for accessory liability, a person had to have acted dishonestly by objective standards and to have been aware that by those objective standards he was acting dishonestly. Dissenting, Lord Millett maintained that *Royal Brunei Airlines* decided that the test of dishonesty is largely objective, although account must be taken of subjective considerations. However, what Lord Hutton said in *Twinsectra* has now been restated and reinterpreted in *Barlow Clowes International Ltd (in liquidation) and others v Eurotrust International Ltd and others* [2006] 1 WLR 1476, where it was accepted by Lord Hoffman, who delivered the judgment of Their Lordships, 'that the test whether a person was consciously dishonest in providing assistance[,] required him to have knowledge of the elements of the transaction which rendered his participation contrary to ordinary standards of honest

behavior'. At p 1481, Lord Hoffman explained that 'the reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were'. Arden LJ in *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, has now endorsed *Barlow Clowes* as representing the current English law.

[60] 'The allegation of dishonesty must be clearly pleaded in the statement of case. We consider that this involves setting out concisely the facts upon which the allegations of the subjective element of dishonesty is founded, and also the facts upon which reliance is placed as demonstrating that the objective element is satisfied, at any rate unless it is manifest that if the facts supporting the subjective elements are proved, then the objective element would be satisfied too' (*Lewin on Trust* (18th Ed), para 40–35). The burden of proof of dishonesty is a heavy one. 'We consider that authorities on proof of knowledge are of general application in relation to proof of dishonesty, albeit that the court is less likely to draw an inference of dishonesty than of knowledge, and where the issue is one of dishonesty, the burden of proof is a heavy one. A defendant should appreciate that if the facts proved by the claimant as to the proper inferences to be drawn from his conduct are such as to shift the evidential burden to him, it will not be safe for him to elect to call no evidence, since the court may infer dishonesty even though the defendant might have been able to provide a credible explanation of his conduct had he elected to call evidence' (*Lewin on Trust* (18th Ed), para 40–36).

[61] The court below correctly held that the test to determine the dishonesty of the accessories is an objective one.

> I accept that, in law, the test to determine the existence of dishonesty is an objective one. The duty of the court being to ascertain whether the remaining defendants either alone or together aided and abetted Kuan and/or Doitbest and Target Concept in the breach by Kuan of the fiduciary duties owed to Doran and are consequently liable to make good the losses suffered by the plaintiffs. I propose in the next part of my judgment to examine the role played by each of the defendants in the breach by Kuan of his fiduciary duties to Doran and rule on the liability of each of the remaining defendants, apart from Doitbest and Target Concept (see p 119JB).

[62] While the court below was right about the test of honesty or dishonesty being an objective one, yet it totally misdirected itself that its duty was only to find 'whether the remaining defendants either alone or together aided and abetted Kuan and/or Doitbest and Target Concept in the breach by Kuan of the fiduciary duties owed to Doran and are consequently liable to make good the

losses suffered by the plaintiffs' to close the issue. With respect, the duty of the court below was also to find if the other defendants were dishonest. But there was not a single finding by the court below that any of the other defendants were dishonest. There were umpteen findings of dishonesty against Alan. But against the other defendants, there were none. Where a trial court fails to make findings, should an appellate court supply the omission?

[63] In *Satnam Investment Ltd v Dunlop Heywood Ltd & Co* [1999] 3 All ER 652, where there was disclosure of certain information by trustees of that information and it was contended that Morbaine was a knowing recipient of that information, and where the trial court failed to make any finding on dishonesty, the English Court of Appeal per Nourse LJ held:

> Before a case can fall into either category there must be trust property or traceable proceeds of trust property. Clearly, DH and Mr Murray can be regarded as trustees of the information and, clearly, Morbaine can be regarded as having been a knowing recipient of it. However, even assuming, first, that confidential information can be treated as property for this purpose and, secondly, that but for the disclosure of the information Morbaine would not have acquired the Brewery Street site, we find it impossible, in knowing receipt, to hold that there was a sufficient basis for subjecting the Brewery Street site to the constructive trust for which Satnam contends. The information cannot be traced into the site and there is no other sufficient nexus between the two. As for knowing assistance, of which dishonesty on the part of the accessory is a necessary ingredient (see below), *we would not have wanted to shut out the possibility of such a claim's being successful if the judge had made a finding of dishonesty against Morbaine*, dishonesty for this purpose having been equated, for the most part, with conscious impropriety; see *Royal Brunei Airlines Sdn Bhd v Phillip Tan Kok Ming* [1995] 3 All ER 97 at 106 ; [1995] 2 AC 378 at 389. *No such finding having been made, a claim in knowing assistance also fails* (Emphasis added.)

[64] In *Goose v Wilson Sandford & Co (a firm)* [2000] All ER (D) 324, where the onus of proving deceit rested on Goose to demonstrate that Wilson had intended the reference to 'Peter's Stones' to be understood in the alleged sense, the English Court of Appeal per Morritt U held that 'there is no finding of the judge to that effect and, in our view, no basis on which this court could supply the omission'.

[65] Given so, we ought therefore to be slow to supply the omission of the court below. In the first place, there were no pleaded facts upon which the allegation of dishonesty was founded and no pleaded facts upon which reliance was placed to demonstrate that the objective test was satisfied. All that were pleaded against the other defendants were the bland fact of participation and or involvement in the impugned resolutions, in the deeds of sale and resale and or whatever, which per se could not demonstrate that the objective test was satisfied. Knowing assistance is not mere assistance, but dishonest assistance. It

is the synthesis of assistance and state of mind. Take for instance the case of defendant 7 who might have 'devised' those impugned resolutions. But that alone, that defendant 7 'devised' those impugned resolutions was plainly not enough to demonstrate that defendant 7 was dishonest. Concise facts must be pleaded, which when viewed objectively must demonstrate that defendant 7 was in a dishonest state of mind when he 'devised' those impugned resolutions. Without those concise facts, it could not be reasonably demonstrated that the objective test was satisfied. In *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188, Suffian LP said that 'In a pleading if fraud is alleged it must be distinctly set out and its details specified. General allegations, however strong, are insufficient to amount to an averment of fraud of which any court ought to take notice. See *Wallingford v Mutual Society* (1880) 5 App Cas 685; *Lawrence v Lord Norreys and others* (1890) 15 App Cas 210'. An action in fraud includes a cause of action for dishonest assistance (see *Bullen & Leake & Jacob's, Precedents of Pleadings* (16th Ed), Vol II para 49–01). Failure by the plaintiffs to plead those concise facts against all other defendants was overlooked. But the failure by the court below to make a finding on the dishonesty of the other defendants could not be taken lightly, for without a finding on dishonesty, accessory liability was not made out (*Satnam*). Without a finding of dishonesty, the finding of 'knowing assistance' was not enough.

[66] In any event, it was not proved that whatever 'knowing assistance' was dishonest. Dishonesty was not proved, even on the basis of the findings of the court below.

[67] In relation to defendant 2 (Alan's father), the court below concluded:

> Admittedly, Kuan Shin's involvement in Kuan's Plans A, B and C was minimal as compared to most of the other defendants. Be that as it may, I hold Kuan Shin's liable since he is a major shareholder of Doitbest and Doitbest is the owner of Liberty Equity. As both these companies are among the biggest beneficiaries of Kuan's Plans A, B and C together with Kuan and Target Concept, in my judgment, Kuan Shin's involvement is sufficient to bring his involvement within the scope of the accessory liability principle propounded in the *Royal Brunei*. Accordingly, I hold Kuan Shin to be liable to the plaintiffs in the sum of RM17,601,051.57 (see 160JB).

[68] In relation to defendant 3 (Alan's mother), the court below concluded:

> In my judgment, following the objective test set out in the *Royal Brunei* case, *although there is no evidence that Madam Tan set out actively to assist Kuan in the implementation of his Plans A B and C*, the evidence reveals that Madam Tan *closed her eyes to what Kuan was doing and happily went along with all his decisions when, if, she had only cared to check, she would have realised that Kuan had placed himself in a position of conflict with his duties to Doran and Plascon Technologies*. Presumably the defence is that Madam Tan neither had the knowledge nor the intention to dishonestly deprive Doran of his rights as a shareholder of Plascon Technologies and

office investment With respect, the only way Madam Tan could have refuted the allegations of the plaintiff, is to attend court and give evidence to substantiate this defence. However, Madam Tan although represented by a counsel different from Kuan, did not file a separate statement of defence and did not attend court at all. Arising from her failure to attend court, and the findings of this court concerning Kuan's Plans and the aid she rendered in assisting him in the implementation of these plans, this court must hold her liable under the objective test propounded in *Royal Brunei* for accessory liability. Accordingly, I hold Madam Tan liable to the plaintiffs for the sum of RM17,601,051.57 (see 141JB).

[69] In relation to the defendant 4 (Alan's wife) the court below had only the following to say to hold her liable to the extent of Alan:

Madam Tang is the wife of Kuan. She was a director of AK Staple Fiber (exh 463 of C4); a director of Liberty Equity (exh 458 of C4); a director of AK Plastictech (exh 480 of C4) and director of Plascon Technologies. Madam Tang signed all of the impugned circular resolutions of April/May 2008. It is significant that Madam Tang only became a director of Plascon Technologies on 18 April 2008 (exh 433 of C4) and a director of AK Plastictech on 25 November 2008. In other words, Madam Tang became a director commencing the passing of the impugned circular resolutions of April/May 2008. The date of her appointment as a director of Liberty Equity and Doitbest are also significant as these dates coincide with, in the case of Liberty Equity, its acquisition of the assets of Plascon Technologies in October 2008 and in the case of AK Plastictech, the lodging of claims against the insurers in early 2009. That Madam Tang's appointment had everything to do with Plans B and C is also evident from the fact that about the only meeting of Plascon Technologies that she attended is the meeting of 4 July 2008 (exh 34 of G3). This meeting called after the departure of Finlay, passed the resolutions designed to implement by way of members resolution, the director's resolutions passed at 26 June 2008 meeting. Following this meeting, Kuan assumed physical control of the Meru factory by the appointment of George Cheong and appropriated the processed material at the Meru factory and acquired possession of the Tadweer raw material detained by Kase Line. In my judgment, following the objective test set out in the *Royal Brunei* case, *although there is no evidence that Madam Tang set out actively to assist Kuan in the implementation of his Plans A, B and C*. the evidence reveals that Madam Tang closed her eyes to what Kuan was doing and happily went along with all his decisions when, if, she had only cared to check, she would have realised that Kuan had placed himself in a position of conflict with his duties to Doran and Plascon Technologies. Presumably the defence is that Madam Tang neither had the knowledge nor the intention to dishonestly deprive Doran of his rights as a shareholder of Plascon Technologies. *With respect the only way Madam Tang could have refuted the allegations of the plaintiff, is to attend court and give evidence to establish that she had no knowledge of Kuan's plans*. However, Madam Tang although represented by a counsel different from Kuan, did not file a separate statement of defence and did not attend court at all. Arising from her failure to attend court, and the findings of this court concerning Kuan's Plans and *the aid she rendered in assisting him in the implementation of his plans*, there is little option but to hold her liable under the objective test propounded in *Royal Brunei* for accessory liability (see 142JB).

[70] It is convenient to first address the above findings against defendants 2–4. As said there was no finding of dishonesty against defendants 2–4. Perhaps, that was an oversight by the court below. But when we examined the findings of facts to find if there were that oversight, we found that we could not infer from the facts found by the court below, that defendants 2–4 were dishonest.

[71] Defendant 2 might have been the majority shareholder of defendant 14 (Doitbest) and defendant 14 might have been the owner of defendant 13 (Liberty Equity). Defendants 13–14 might even have been the biggest beneficiaries of whatever share allotment. But that would not make up, even by any stretch of the imagination, to any evidence that defendant 2 assisted Alan in the breach of the joint venture and breach of fiduciary duties. In fact, there was no finding at all by the court below that defendant 2 assisted Alan, let alone assisted in a dishonest state of mind. In fact, in the words of the court below 'My only reason for holding Kuan Shin liable for the breach of fiduciary duties on the part of Kuan is because of the role played by Doitbest in Kuan's Plan B' (see 159JB). Hence, it was the finding of the court below that it was defendant 13 and not defendant 2 who assisted Alan. Upon that finding, the claim against defendant 2 ought then and there to have been dismissed. After all, it was the finding of the court below, which with respect it entirely forgot, that Alan was the alter ego of defendants 14 and 19, and that Alan controlled defendants 14 and 19. Thus, in line with its own findings that defendant 2 had not rendered assistance and that Alan was the alter ego of defendants 14 and 19, the court below could not find that defendant 2, who was not the directing mind of defendant 14, was dishonest. Without the findings of assistance and dishonesty, the finding that the involvement of defendant 2 was 'sufficient to bring his involvement within the scope of the accessory liability principle propounded in the *Royal Brunei*' was a manifest error that could not be sustained or supported.

[72] Dishonesty of defendants 3–4 could also not be inferred from the facts as found. The court below held that *'there is no evidence that Madam Tan set out actively to assist Kuan in the implementation of his Plans A, B and C'*. (Emphasis added.) But in the same breath, the court below also held that it was 'the findings of this court concerning Kuan's plans and *the aid she rendered in assisting him in the implementation of these plans*'. (Emphasis added.) The court below identically held that *'there is no evidence that Madam Tang set out actively to assist Kuan in the implementation of his Plans A, B and C'*. (Emphasis added.) But again in the same breath, the court below also held that it was 'the findings of this court concerning Kuan's plans and *the aid she rendered in assisting him in the implementation of these plans*'. On the one hand, it was held that there was no evidence that defendants 3–4 set out actively to assist Alan, but on the other hand, it was held that defendants 3–4 had aided Alan. Given those contrary

findings, there was no firm finding that defendants 3–4 assisted Alan. The court below held that defendant 3 had 'closed her eyes to what Kuan was doing and happily went along with all his decisions when, *if, she had only cared to check, she would have realised that Kuan had placed himself in a position of conflict with his duties to Doran and Plascon Technologies*' (Emphasis added) and that defendant 3 could only refute the allegations of the plaintiffs by testifying in court. The court below identically held that defendant 4 had 'closed her eyes to what Kuan was doing and happily went along with all his decisions when, *if, she had only cared to check, she would have realised that Kuan had placed himself in a position of conflict with his duties to Doran and Plascon Technologies*'. (Emphasis added.) To put that in the converse, the court below held that defendants 3–4, who had not 'cared to check', would not 'have realised that Alan had placed himself in a position of conflict with his duties to Doran and defendant 22'. Since it was the finding that defendants 3–4 had no knowledge of whatever conflict of duties, it would only follow that the dishonesty of defendants 3–4 had not been proved by the plaintiffs. For this reason, the failure by defendants 3–4 to testify was not damaging to their cause. It was a misdirection to hold that defendants 3–4 should prove to the contrary when the plaintiffs had not proved dishonesty in the first place.

[73] As said, there was no finding on the crucial ingredient of dishonesty against defendant 5. Instead, all that the court below found against defendant 5 was encapsulated as follows:

> In my judgment, Deric Leong was so inextricably involved in Kuan's Plan B and bearing in mind his knowledge of the dispute between Kuan and Doran and the ownership of the plant and machinery and the staple fiber machine in AK Plastictech, he is clearly liable under the principles of law applicable for accessory liability. Accordingly, I hold Deric Leong liable to the plaintiffs in the sum of RM17,601,051.57 (see 148JB).

According to the court below,

> Defendant 5's involvement in Kuan's breach of fiduciary duty commenced with the implementation of Plan B ie stripping of the plant and machinery of Plascon Technologies from the Meru factory. This must necessarily have been the case since Deric Leong was the project manager of the factory and the most senior qualified person in the factory. Additionally, it must be borne in mind that when the plant and machinery was moved from Meru to the TPG site, Deric Leong was appointed by Kuan to be in charge of the operations at the TPG site (see 143JB).

[74] The court below deduced that defendant 5 was involved by reason that defendant 5 was the project manager of the factory, the most senior qualified person in the factory, and the person appointed by Alan to take charge of the operations at the TPG site. The court below rejected the defence of defendant 5 who said that he was not personally involved in the dismantling of the plant

and equipment, and that he had not assisted Alan to breach his fiduciary duties for reason that (a) he was not directly involved directly in either the dismantling of the plant and machinery at Meru or the assembling of the same at the TPG site, (b) when the machinery was dismantled from the Meru site, he was informed by Kuan that the machinery was being transferred to the TPG site, as, according to Kuan, the rental was too high for production to continue at the Meru site, and, (c) as he was uncertain as to whether what Alan was doing was lawful, he secured an indemnity from Alan in respect of Plascon Technologies and Target Concept. But be that as it may, we must yet point out that it was not appreciated that the pleaded case against defendant 5 was not that he assisted Alan to strip and move the plant and machinery from Meru to TPG. The pleaded case against defendant 5 was that he issued a s 218 notice on defendant 22, that he procured the winding up of defendant 22 based on a fictitious debt (see paras 42.4–42.5 at 437AR), and that he, through defendant 15, entered into those three deeds of sale and three deeds of resale of the movable property of defendant 22 (see para 42.14 at 439AR). That was the pleaded case that defendant 5 had to answer. The court below was not entitled to decide the claim against defendant 5 in a matter in which no issue had been raised (see *Seven Seas Supply Co v Rajoo; Janagi v Ong Boon Kiat*) — namely, the removal of the plant and machinery from Meru to TPG. But alas, in relation to the pleaded case, there were no findings by the court below on defendant 5's involvement in the s 218 notices, in the winding up of defendant 22 and or in the three deeds of sale and three deeds of resale (see 142–148JB). And in the absence of those findings, no legal liability could attach to defendant 5. At any rate, the evidence was that the s 218 notices on defendant 22 were issued by Alan and defendants 14–17 and 19 (see 2635, 2639, 2643, 2648, 2652, and 2658AR), and that defendant 22 was voluntarily wound up (see 12399AR). The evidence was also that defendant 5 was not the proprietor of defendant 15 since August 2004 (see 2891AR) and that defendant 5 had nothing to do with the three deeds of sale all dated 21 July 2008 (see 3986–4079AR) and three deeds of resale all dated 15 October 2008 (see 4080–4109AR). All those deeds of sale and deeds of resale were executed by defendants 6 and or 23. It was so evident that defendant 5 had nothing to do with the sn 218 notices, the winding up of defendant 22, and or the three deeds of sale and three deeds of resale, except for the fact that he was a nominee shareholder (3010AR) and director (see 12559AR) of defendant 19 whose alter ego, according to the court below, was Alan. The pleaded case against defendant 5 was plainly refuted, and disproved.

[75] There was also no finding of dishonesty against defendant 9. Rather, the findings of the court below were that defendant 9 passed the impugned resolutions, participated in meetings of defendant 22 held on 27 June 2008 and 4 July 2008, took control of the factory in Meru and all its contents including the factory assets, held himself out as the person who sold the finished goods and raw material stored at the factory at Meru, held himself out

as the person who negotiated and sold the factory assets to the 'Leong companies', held himself out as the chief operations officer of defendant 22, attended the 'creditors' meeting representing Doitbest and Target Concept', participated 'in the issuance of the 218 notice on behalf of Target Concept, when he had no knowledge as to whether any debt was due to Target Concept' and executed 'the tenancy between Plascon Technologies and New World Consultancy Sdn Bhd knowing that New World Consultancy was Kuan's nominee' (see 155JB). Based on those findings, the court below held that defendant 9 'was very much involved in assisting and aiding Alan in the implementation of Plan B and consequently liable under the objective test set out in *Royal Brunei*' (see 157JB) and that 'George Cheong was so inextricably involved in the implementation of Kuan's Plan B that I have little hesitation in holding him liable to the plaintiffs in the sum of RM17,601,051.57' (see 159JB).

[76] However, those findings were not within the purview of the pleaded case against defendant 9, which had to do with the impugned resolutions of 18 April 2008, 25 April 2008, 14 May 2008, 16 May 2008, 20 May 2008, 28 May 2008 and 4 July 2008. It was not pleaded that defendant 9 seized control of the factory in Meru and all its contents including the factory assets, held himself out as the person who sold the finished goods and raw material stored at the Meru factory, held himself out as the person who negotiated and sold the factory assets to the 'Leong companies', held himself out as the chief operations officer of defendant 22, attended the 'creditors' meeting representing Doitbest and Target Concept', participated 'in the issuance of the 218 notice on behalf of Target Concept', and executed 'the tenancy between Plascon Technologies and New World Consultancy Sdn Bhd'. In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2009] 5 MLJ 770, the Court of Appeal held (per Low Hop Bing JCA) that the issue of victimisation was never pleaded and the Industrial Court had gone on a frolic of its own in finding that the employee was victimised, and (per Abdul Malik Ishak JCA) that in the absence of pleadings, evidence cannot be considered by the court. Further, the court below was at odds with its own findings when it held that defendant 9 was 'liable under the objective test set out in *Royal Brunei*', for at 156JB, the court below had held a very different opinion of defendant 9:

> George Cheong is not intelligent enough to have been involved in the planning of Plans A, B or C. George Cheong is the individual who was used by Kuan to implement his Plan B including taking over physical control of the Meru factory, expelling Finlay and allowing Kuan to appropriate and sell the assets of Plascon Technologies. All this was done by Kuan but in the name of George Cheong. George Cheong was the director of most of Kuan's companies but *George Cheong had no clue as to what he was doing … In the ultimate analysis, George Cheong was nothing but Kuan's puppet and* this was George Cheong's own view of himself. (Emphasis added.)

[77] Now given that it was accepted by the court below that defendant 9 was 'Alan's puppet' and 'was used by Alan' and 'had no clue as to what he was doing', then it would only follow that defendant 9 lacked the subjective element of conscious impropriety.

[78] On what amounts to dishonesty in the context of dishonest assistance in a breach of a fiduciary obligation, Lord Nicholls in *Royal Brunei Airlines*, explained at p 389:

> Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher and lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless …

[79] As said by Lord Hoffman in *Barlow Clowes International Ltd (in liquidation) and others v Eurotrust International Ltd and others*, 'the test whether a person was consciously dishonest in providing assistance[,] required him to have knowledge of the elements of the transaction which rendered his participation contrary to ordinary standards of honest behaviour'. Since defendant 9 'had no clue as to what he was doing' and therefore lacked knowledge of the elements which rendered his participation contrary to ordinary standards of honest behaviour, then he could not, under the objective test, be held to have been dishonest. Subjective elements will be judged

objectively. But without any conscious impropriety, defendant 9 was in the same boat as defendants 10–12, whom the court below held 'were not in a position to exercise independent judgment' (see 161JB). On the basis of the co-existing facts found by the court below, the only reasonable inference ought to have been that defendant 9 was not dishonest. But the wrong inference was drawn. We could not support the conclusion of the court below that defendant 9 was liable under the objective test set out in *Royal Brunei Airlines*.

[80] The accessory liability of defendants 6, 13, 15–17, 21 and 23 were considered, in a single exercise by the court below. We have already disposed of the appeal of defendant 21. In relation to the findings of the court below against defendants 6, 13, 15–17 and 23, our first comment is that the liability of a sole-proprietor or co-proprietors is co-extensive and not independent of the liability of the sole-proprietorship or co-proprietorship. If any, the liability of defendants 6 and 23 were that of the sole-proprietorship (defendant 15) or co-proprietorship (defendants 17). There was no double liability, one of the proprietor and the other of the proprietorship, as the court below had made it out to be. The personal liability of defendants 6 and 23 was not even there on account of their directorships in defendant 16. But that distinction was not made by the court below, be it in its final orders, or in its final findings which were as follows:

> It is my finding that Tony Leong, Liberty Equity, Ho Fatt, Techfident, Pro-Management and Kar Poh assisted in one way or another in the implementation of this part of Kuan's Plan B. The contractor companies entered into three settlement deeds purportedly by way of contra with Plascon Technologies. Under these settlement deeds, the contractor companies were supposed to have acquired possession and ownership of all the assets of Plascon Technologies with the consideration being the set off of the debts purportedly due from Plascon Technologies to these three defendants. The set off debt being a discounted sum from the aggregate of 1.2 million stipulated in the 218 notices (see 121JB).

[81] According to the court below, defendant 6 'was involved in Alan's breach in two aspects' (see 123JB), namely:

(a) that 'he participated in the issuance of 218 notices to Plascon Technologies on behalf of the contractor companies when, for reasons that appear later in this judgment, it is my finding that this debt is not a genuine debt … Tony Leong willingly participated in an exercise which was designed by Kuan to put pressure on Doran to pay him RM4 million as part of his Plan A … Tony Leong should have been put on notice when Kuan asked him to issue a notice to wind up a company which was partially owned by Kuan himself …', and

(b) that he assisted Alan 'to defeat the distress proceedings commenced by the landlord of the Meru factory' by causing 'the contractor companies to

enter into sham settlement deeds not for the purpose of preserving the assets of Plascon Technologies but so as to enable Kuan to transfer the assets of Plascon Technologies to Liberty Equity after affidavits had been filed in the distress proceedings exhibiting the settlement deeds and Selva claiming to have received the sum of RM244,918.00 from Pro-Management …' (see 121JB).

[82] What the court below meant by Plan A and Plan B was explained at paras 90 and 96JB:

> Plan A It is my finding that the lawyer Kuan spoke to is Selva and that Kuan's subsequent actions undertaken in consultation with Selva were designed to force the hand of Doran to compensate him to the tune of RM4m, which Kuan falsely claimed to be his contribution to Plascon Technologies. This is what I would refer to as Kuan's Plan A. It is also my finding that Kuan had also resolved based on the advice of Selva that if Doran should refuse to compensate him this amount, then, Kuan would implement Plan B (see 90JB).
>
> Plan B In my judgment, Plan B involved the following: (a) take control of the management and the finances of Plascon Technologies and AK Staple Fiber; (b) take physical control of the Meru factory by placing new security personal loyal to Kuan and not Finlay, (c) expel Finlay and James Baker from the factory in Meru. This was to enable Kuan to acquire possession of the machinery and equipment and all other assets of Plascon Technologies; (d) strip the Meru factory of plant and machinery and transfer them back to the TPG site to enable Kuan and his team to commence operations there; (e) appropriate and sell the processed material of some 430 metric tons located in the Meru factory; (f) arrange for the delivery of the staple fibre machinery originally purchased by Plascon Technologies from Jiangyin Zhongrui Non-Woven Fabric Machinery Co Ltd to be delivered to the TPG site; (g) transfer all the moveable items belonging to Plascon Technologies including all the office equipment and cars to Kuan's own business premises at the Sri Hartamas office (h) seized the Tadweer raw material after expelling Finlay and appropriated the sale proceeds (see 96JB).

[83] The court below held that Alan would implement Plan B after Plan A had failed — 'It is also my finding that Kuan had also resolved based on the advice of Selva that if Doran should refuse to compensate him this amount, then, Kuan would implement Plan B'. But with respect, the established evidence would not support that deduction. Even the co-existing findings of the court below would not permit such a supposition. The established evidence was that the impugned resolutions were passed in April/May 2008. In other words, if there were a 'Plan B', then it was implemented in part in April 2008. But 'Plan A' only failed in June 2008 — 'In my judgment, the contents of his e-mail supports my finding that Kuan's initial plan ie Plan A was to demand for payment of RM4m for him to walk away from the joint venture company. This plan of action remained the intention of Kuan and Selva until Doran refused to pay the RM4m at their Blue Wave Hotel meeting in June 2008' (see 97JB).

Since 'Plan A' only failed in June 2008, whereas 'Plan B' was already implemented in part in April 2008, then it could not be that 'Plan B' was implemented after 'Plan A' failed. Sure, there were interwoven and inter-related events. But to hold that there was a 'Plan A' followed by a 'Plan B' was against the weight of the established evidence and also against the co-existing findings of the court below. All s 218 notices were dated 18 April 2008. It was the finding of the court below that those 218 notices were issued in April 2008 (see 126JB). It was held that defendant 6 'participated in the issuance of 218 notices … in an exercise which was designed by Kuan to put pressure on Doran to pay him RM4m as part of his Plan A …' and that Alan would unleash 'Plan B' upon failure of 'Plan A'. But since 'Plan B' was implemented in part in April 2008, then it was already passed 'Plan A' when Alan met Doran at the Blue Wave Hotel in June 2008. Since 'Plan A' was already passed when Alan met Doran at the Blue Wave Hotel in June 2008, then those s 218 notices could not have been designed to put pressure on Doran to settle, for Alan had already shown his hand and nailed his colours to the mast in April 2008, when he set 'Plan B' into motion. Based on its own co-existing findings, that would be the reasonable deduction that should have been made by the court below. The first act of assistance inferred against defendant 6 — the s 218 notices were designed to put pressure on Doran to settle — was not supported by co-existing findings and was not validly drawn.

[84] The second act of assistance inferred against defendant 6 — he assisted Alan to defeat the distress proceedings … by causing the contractor companies to enter into sham settlement deeds — was drawn from suppositions and not evidence. It was a supposition that the statements in the so-called 'Yew Report' used by the court below to support its findings that the three deeds of sale and three deeds of resale were sham transactions were admissible evidence when they were not. The 'Yew Report' was unsigned and unverified by the maker. As such, it could not be relied on testimonially. It was like a police report. The mere production of a police report is proof of a police report but not of its contents. To prove the contents of the police report, the maker must testify. In the instant case, the court below relied testimonially on the 'Yew Report' and gave full weight to all statements contained therein, as if it were testimonial truth, when the maker of the 'Yew Report' had not testified to its contents. To compound the error, the court below even required rebuttal evidence from the defendants to rebut the 'Yew Report', when the plaintiffs had not even proved the statements in the 'Yew Report'. It was also a supposition that all knew what was in the subjective mind of Alan, because of the fact of their association with Alan, when what was required from the plaintiffs was proof of the subjective elements. In the result, the big picture was missed.

[85] The fact of the matter was that the finances of defendant 22 were not in a healthy state. That was more or less admitted by Finlay in his e-mail dated 23

June 2008 (see 7812AR) where he wrote of 'arguing over claims of suppliers … to avoid paying their bills' (see 7813AR) and 'querying and bull-shitting' bills (see 7815AR). Even the court below accepted that defendant 22 had a cash flow problem (see 660AR) and outstanding debts (839AR). That was the factual background against which the claims of defendants 15–17 were made for work executed before the impugned resolutions, (see 3993–4022AR for the invoices of defendant 15, 4043–4063AR for the invoices of defendant 16, and 4074–4076AR for the invoices of defendant 17), when Finlay was in charge of operations. But there was no evidence that any of those claims were ever rejected. Yes, the accounts might not have been reconciled. But that could not translate that the claims of defendants 15–17 were therefore false. The court below held that there was 'a genuine doubt concerning there being a debt due from (defendant 22) to (defendant 15–17)' (see 126JB at 251–252AR). But with respect, the standard of proof was not on the basis of doubt, but rather, at least, on the balance of probabilities that the claims were false. And on the balance of probabilities, it would not seem that the claims of defendants 15–17 were false, for defendants 15–17 were all engaged at the factory at TPG or Meru, based on the following findings or evidence. The court below accepted that defendant 15 was awarded work at the factory at Meru and that after March 2008 defendant 15 issued invoices for work executed (see 126JB at 254AR). Doran admitted that defendants 16–17 were engaged at Meru (see 864AR). But were they paid for work at the factory at TPG and or Meru? Finlay could not confirm that RM3.5m was paid to defendant 15 (see 713AR). Indeed, the entire tenor of the testimony of Finlay was that monies were due to defendants 15–17 — 'we were facing bills for the installation of the Meru plant … at this time there were creditors … the company was facing pressure from creditors' (see 658–659AR), and that defendants 15–17 in May 2008 were engaged at the factory at Meru (see 718AR). Finlay even admitted that defendant 22 owed monies to defendant 15 for work executed at the factory at Meru (see 721AR). Doran too was aware that defendants 15–16 were not paid (see 866AR). Doran's reason for non-payment was 'at that time we were not happy with some of the work done but we wanted to verify the work. We wanted to know what work done properly, to verify the claims' (864AR). In the face of that latter evidence, it could not seem that the claims of defendants 15–17 were contrived and or were without basis.

[86] The burden of proof was a heavy one. Since it was not clear that those claims of defendants 15–17 were false, then it could not be concluded that the three deeds of sale were sham transactions, in the sense that debts were contrived to make up the consideration for the three deeds of sale. Perhaps, those three deeds of sale was a devise to steal a march on other creditors (see 3068AR for list of the creditors after liquidation of defendant 22). But to say that defendants 6 and 23 had entered into those three deeds of sale, solely to assist Alan could not stand to reason. Defendants 6 and 23 were not exactly selfless ants whose very existence was to serve the queen. They had outstanding

claims. They had their own interest to protect. It would be entirely within reason to deduce that defendants 6 and 23 had probably entered into the three deeds of sale to secure their own interest, which would be wholly unsecured in the event of the liquidation of defendant 22. The three deeds of resale were also entered for self interest, probably to secure whatever payment, even if by instalments, or else be stuck for who knows how long with plant and machinery which had a niche market and would not be easily disposed. A reasonable businessman would cut losses. On the balance of probabilities, that would have been the subjective elements that motivated defendants 6 and 23 to enter into those three deeds of sale and three deeds of resale. We could not therefore agree with the court below that defendants 6 and 23 did all that they did only to serve the interest of Alan.

[87] We would also not supply the omission of the court below, to find dishonest assistance. Given that there were no pleaded facts upon which the allegation of dishonesty was founded and no pleaded facts upon which reliance was placed to demonstrate that the objective test was satisfied, and given that it was not satisfactorily shown that defendants 6 and 23 were in a dishonest state of mind when they entered into the three deeds of sale and three deeds of resale, we see no reason to supply the omission of the court below. Given further that there was no proof of the loss occasioned by those three deeds of sale and three deeds of resale, we have no reason whatsoever to support the court below in its final award against defendants 6, 15–17 and 23.

[88] The accessory liability of defendants 8 and 18 was also not satisfactorily evaluated. Again, in the first place, there were no pleaded facts upon which the allegation of dishonesty was founded and no pleaded facts upon which reliance was placed to demonstrate that the objective test was satisfied. In the result, there were no findings of facts upon which the allegation of dishonestly was founded and upon which reliance was placed to demonstrate that the objective test was satisfied. There were findings by the court below that defendant 8 was party to certain impugned resolutions, and that defendant 18 was allotted 750,000 shares in the capital of defendant 22 (see 149JB). But there was no finding by the court below that the participation of defendants 8 and or 18 were dishonest. In fact, the court below was at two minds about the conduct of defendant 8 — 'in my judgment, there are two possible ways to view the conduct of Sri Ram. The first is the manner suggested by Sri Ram ie that he himself was a victim of Kuan. The second is that Sri Ram agreed to assist (Alan) in his Plan B but withdrew when he realised that (Alan) was not serious in the Perak venture and did not keep his promise as regards payments promised to him for the work undertaken by him in Perak for the benefit of (Alan) and (Defendant 21)' (see 151JB). The court below relied on three so-called facts, to wit (a) that defendant 8 was promised shares and a directorship in defendant 22, (b) that defendant 8 knew that Doran and Alan were partners and that

there was a dispute between them, (c) that defendant 8 could check with Finlay who was in Malaysia, for the reason why Alan would be allowed to take over the bank accounts of defendant 22, to prefer the second view (see 152JB). But at the same time, the court below also accepted that 'there was some truth in this assertion (that defendant 8 was himself a victim and that he resigned as soon as he realised that Alan was not genuine in his interest in the Perak venture) of Sri Ram because he resigned on 20 May 2008 some four days after he signed the circular resolutions conferring upon (Alan) and his family members sole control of the bank accounts of (defendant 22)' (see 150JB). Now given that the court below was in two minds about the conduct of defendant 8 and that there was no finding on dishonesty, we could not reasonably perceive how it could have been demonstrated that the objective test was satisfied against defendants 8 and 18.

[89] Defendant 7 was practically singled out by the court below as the *bete noir* amongst the other defendants. Defendant 7 was held to have assisted Alan in all Plans A, B and C (see 128–137JB). Amongst the specific findings of the court below were (a) that defendant 7 had a close relationship with Alan (see 128JB), (b) that Alan confided in defendant 7, (c) that defendant 7 helped Alan to conceive Plans A and B (see 129JB), and, (d) that defendant prepared the impugned resolutions of April/May 2008 'based on the fact that defendant 7 was the only lawyer who was close to (Alan) throughout 2008 … that Alan confided in defendant 7 … that defendant 7 was advising Alan on his rights as a shareholder behind the backs of Doran and Finlay in April 2008 whilst remaining the company solicitor and secretary … the wording of the resolutions clearly point to the resolutions having been prepared by a lawyer… it is reasonable to assume that the resolutions were prepared by him due to his familiarity with the drafting of resolutions as a lawyer …' (see 130JB).

[90] The evidence of defendant 7 and Alan that the impugned resolutions were prepared by one Joanne Tan was rejected. To the contrary, the court below held that defendant 7's involvement in Plans A and B was 'best evinced by the contents of exh 22' where which defendant 7 expressly requested Alan to remove his e-mail address from the draft e-mail that he (defendant 7) had prepared for Alan to be sent to Doran. The other factors that influenced the court below to find that defendant 7 was involved in Plan B were that defendant 7 was 'not neutral in the dispute' (see 131JB), that Alan and defendant 7 implemented Plan B the moment Doran rejected Alan's demand for the return of RM4m (see 132JB), that defendant 7 would not walk away, when he could, from the dispute between Doran and Alan, and that in his affidavit filed to resist the distress proceedings taken out by the landlord of the factory at Meru, defendant 7 lied that defendant 17 had paid him RM244,918 to stay the auction (see 135JB). According to the court below, by his insistence on Doran to have him removed as secretary of defendant 22 by a board

resolution when Alan was in control of defendant 22, rather than to voluntarily resign as demanded by Doran, defendant 7 showed his intention to remain loyal to Alan and to carry out Plan B (see 133JB). Purportedly on the grounds set out in 124JB, which in fact were not any grounds at all to support the finding, the court below held that defendant 7 prepared the three deeds of sale. The court below also made the following findings:

> It is also my finding that the sale and purchase agreement between the contractor companies and Liberty Equity was prepared by Selva. This makes sense since Liberty was controlled by Kuan and Kuan's Plan B as devised by him and Selva envisaged the ultimate transferee of the plant and machinery being Liberty Equity through the circuituous route of getting the contractor companies involved (see 134JB).
>
> It is my finding that the fact that Selva was prepared to risk his whole career for Kuan demonstrates the closeness in the relationship between Selva and Kuan and Selva's deep involvement in the planning of Plans A and B and in the execution of these plans. Accordingly, we have here a lawyer cum secretary aiding and abetting Kuan in the breach of his fiduciary duty of loyalty to Doran by assisting him to dissipate the assets of Plascon Technologies, for the benefit of Liberty Equity, the ultimate transferee under Plan B as originally devised by Kuan and Selva (see 135JB).

[91] Even the letter of resignation of defendant 7 as secretary of defendant 22 was held by the court below as 'yet another attempt by him to camouflage his closeness to Alan and his entanglement in the implementation of Plans A and B' (see 136JB).

[92] Based on all the aforesaid, the court below concluded against defendant 7:

> Since it is my finding that Selva was inextricably involved with Kuan in the planning and implementation of Plans A and B and since these plans involved Kuan acting in breach of his fiduciary duties to Doran and the two joint venture companies, to Selva's knowledge, it must follow that Selva is liable to the plaintiffs for aiding and abetting Kuan. I hold Selva's liable to the plaintiffs in the amount of RM17,601,051.57. This judgment sum does not include the Ringgit Malaysia equivalent of the sum of USD1,798,153.40 representing the plaintiffs' claim for the Tadweer raw material (see 137JB).

[93] But when all is said and done, there was not a single finding by the court below that defendant 7 was dishonest. There was not a single pleaded fact upon which the allegation of dishonesty was founded and upon which reliance was placed to demonstrate that the objective test was satisfied. What was pleaded against defendant 7 was that he 'devised' those impugned resolutions. But there was not a single pleaded fact upon which reliance was placed to show that defendant 7 had knowledge of the elements of the transaction which rendered his participation contrary to ordinary standards of honest behaviour. Without

other pleaded facts to demonstrate that the objective test was satisfied, the general allegation that defendant 7 'had devised' those impugned resolutions was, as said, simply not enough to demonstrate that defendant 7 was dishonest (for an illustration of the facts and matters to be pleaded to support an allegation of dishonesty, see *Bullen & Leake & Jacobs, Precedents of Pleadings*, (16th Ed), Vol 2 para 54-M2 at p 883).

[94] What was not pleaded was that defendant 7 participated in Plans A and B. As a matter of fact, it was not pleaded that there was a Plan A or Plan B or Plan C. Even so, we find that the entire finding of the court below against defendant 7 was based solely on his participation in Plan A and B. But even if such participation were pleaded, we could not see that the participation of defendant 7 in Plans A and B demonstrated that defendant 7 was dishonest, without a concomitant finding that defendant 7 had knowledge of the elements of the transaction which rendered his participation in Plans A and B contrary to ordinary standards of honest behaviour. Now given further that Plans A, B and C, which were conceived by the court below, could not, for the reasons given hereinbefore, stand as probable, we would say the finding of liability against defendant 7 which was based solely on his participation in Plans A and B, had not even support of the fact of participation. Without the fact of participation and or a finding of dishonesty, we could not support the finding of liability.

[95] The finding of liability against defendants 14 and 19 was also made without any reference to the pleaded case. According to the court below:

> The relief sought against Doitbest and Target Concept is that they are equally liable in damages for the breaches of Kuan under the principle that these two defendants are Kuan's alter egos in the venture between Kuan and Doran. Under the principle of alter ego, the liability of one must be seen as resulting in liability for the other two, to the same extent (see 112JB).

[96] What had happened was that counsel for the plaintiffs applied to the court below to invoke the alter ego principle against defendants 14 and 19, and the court below agreed that Alan was the controlling mind of defendants 14 and 19.

> Applying the aforesaid principles of Law to the facts of this case, there is overwhelming evidence that Kuan was the controlling mind of the Doitbest and Target Concept in all of their involvement and/or dealings in and with Plascon Technologies and AK Staple. Indeed, Kuan's control of these two companies vis a vis the two joint venture companies was so dominant that both Kuan and Selva were only able to recall Kuan's father's visit to Ipoh to sign the MOU with the Perak State Government as the only instance of the involvement of any member of Kuan's family in the affairs of AK Staple Fiber. Accordingly, I have little hesitation in holding Doitbest and Target Concept to be the alter egos of Kuan and consequently

hold these two companies to be equally liable with Kuan in the sum of RM23,894.588.47 to the plaintiff (see 115JB).

[97] Except that as luck would have it, the pleaded case against defendants 14 and 19 were not that they were Alan's alter egos, but that they were Alan's accessories (see 446AR). But there were no findings that defendant 14 and 19 were accessories. And in the absence of such findings, defendants 14 and 19 could not be held liable. Since defendant 14 could not be liable, then defendant 13, who was held as one and the same as defendant 14 by the court below, would similarly not be liable.

[98] In a word, we could not support the orders against the other defendants, not only because of the state of the pleadings and prayers and the absence of proof of loss occasioned by each and every other defendant, but also because the findings of the court below on dishonest assistance fell short of the requirements of law.

ASSESSMENT OF DAMAGES

[99] 'A judgment for too little, is as bad as a judgment for too much' (*The King v Henry Salomons* (1786) 1 TR 249). How the court below had gone about the assessment of damages was encapsulated in paras 110–111JB:

> It is the submission of counsel for the plaintiffs that the measure of damages available to the plaintiffs is to either seek an order for the disgorgement of the profits of the joint venture companies or seek a refund of the entire amount of Doran's investment in cash and for the material supplied through Tadweer. Since the progress of the joint venture companies was destroyed midway by the callous conduct of Kuan and there is no easy formula to determine the loss by way of loss of profits suffered by the joint venture companies including Doran, I agree with counsel for the plaintiffs that a fair and reasonable head of damage would be for the return of the entire amount of Doran's investment in the two joint venture companies (see para 110JB)
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> It is the evidence of Doran that the plaintiff's total investment amounted to RM23,894.588.47. I pause to observe that there was no attempt made by counsel for Kuan to dispute Doran's evidence of the quantum of his investment. Cross-examination by counsel was limited to establishing that the plaintiff's investments were expended by Kuan in the ordinary course of the business of the two joint venture companies. In the light of my findings that Kuan was in breach of his fiduciary duties and that Doran did suffer a loss by reason thereof, I order judgment in favour of the plaintiffs against Kuan for the sum of RM23,894.588A7 (see para 111AR).

[100] In just those two short paragraphs, the court below was done with the assessment of damages. Alan was ordered to pay RM23,894.588.47, which was

A the total of the cash injected plus the alleged value of the raw materials. What the court below had actually done was to order restitution of the total investment, on the ground that 'there (was) no easy formula to determine the loss by way of loss of profits suffered by the joint venture companies including Doran'.

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[101] Four authorities (*Target Holdings, Newacres* [2000]; *Day v Mead* [1987] 2 NZLR 443, and *Chirnside v Fay* [2006] NZSC 68) were cited by the respondents to support the argument that the respondents were entitled to recover the full measure of their investment. But we do not perceive that those four authorities would lend such support. In *Target Holdings*, the House of Lords held that a trustee could not be liable to compensate the beneficiary for losses which the beneficiary would in any event have suffered if there had been no such breach, that the defendant's wrongful act had to cause the damage complained of, and that the plaintiff was to be put in the same position as he would have been if he had not sustained the wrong for which he was being compensated. That the award of damages is to compensate losses caused by the wrongful act was also upheld in *Day v Mead*, where the Court of Appeal of New Zealand held that the plaintiff who was partly the author of his own loss was not entitled to the full sum invested. In *Chirnside v Fay*, the Supreme Court of New Zealand held that the appropriate remedy where a fiduciary profited from breach of duty was disgorgement of the profit through an account. However, in *Newacres [2000]*, the Federal Court held that disgorgement of profits is not the only remedy for breach of fiduciary duty, and that the measure of compensation, which is to put a plaintiff in a position he would have been had the breach not been committed, could be as provided in the joint venture agreement. None of those four authorities said that the respondents should be entitled to the full measure of their investment.

[102] In any case, it would not seem equitable to order full restitution of the total investment, for there were losses that were not the result of any breach. 'The question which came before the House of Lords in *Target Holdings* was whether a trustee who commits a breach of trust is liable to compensate the beneficiaries not only for losses caused by the breach, but also for losses which they would have suffered in any event even if there had been no breach … The House of Lords reaffirmed that the test is one of 'but for' causation. Where, as in *Target Holdings*, the loss would have been caused in any event, there is no right to compensation' (see *Levin on Trusts* at para 39–11). 'The exercise is one of restoration to the plaintiff of the value of what has been lost 'through the breach' or 'as a result of the breach' (*Swindle and others v Harrison and another* at 734 per Mummery J). The RM3.5m that was expended towards the TPG factory but which was practically wasted when Doran instructed the plant and machinery to be moved from TPG to Meru was not occasioned by breach. That was a not 'a loss in fact suffered by (the plaintiffs) and which, using hindsight

and common sense, can be seen to have been occasioned by the breach' (see *Target Holdings* at 439 per Lord Browne-Wilkinson). That loss of RM3.5m was wasted by Doran and so should be deducted from whatever equitable damages (see *Spry on Equitable Remedies* (6th Ed), at p 647). The operational expenses from 2006–2008 should also be deducted. Indeed, a total of RM10,994,538.76 had been expended towards the renovation and building costs of the factories at TPG and Meru and towards operational costs and salaries before the advent of the impugned resolutions of April/May 2008 (see 5260AR, which was relied by both Alan and Doran), that is, before breach of the joint venture. On 27 March 2008, there was a sum of RM2,087,817.10 standing to the credit of defendant 22 (see 5260AR).

[103] In *Thompson v Smith's Shiprepairers (North Shields) Ltd* [1984] QB 405, at pp 443–444, Mustil J said:

> … a substantial part of the impairment took place before the defendants were in breach, why in fairness should they be made to pay for it? The fact that quantification is impossible should not alter the position. The whole exercise of assessing damages is shot through with imprecision. I see no reason why the present impossibility of making a precise apportionment of impairment and disability in terms of time, should in justice lead to the result that the defendants are adjudged liable to pay in full, when it is known that only part of the damage was their fault. What justice does demand, to my mind, is that the court should make the best estimate which it can, in the light of the evidence, making the fullest allowances in favour of the plaintiffs for the uncertainties known to be involved in any apportionment.

[104] 'Nothing ventured, nothing lost'. The plaintiffs could not recover the full measure of their investment. What would appear to be most just in the particular circumstances would be to put the plaintiffs back to the position before breach, that is, as at April/May 2008.

[105] As at April/May 2008, the joint venture companies had the following assets, (a) the raw material and or the processed material, (b) the machinery or deposits, and, (c) the movable property that were the subject of the three deeds of sale and three deeds of resale, which must be restored by Alan. The evidence was that the raw material was of the value of RM5,398,830.33 and that a sum of RM830,000 was paid for its clearance from customs. The further evidence (see 5260AR) was that a sum of RM2,883,284.01 was paid to the machinery manufacturer towards the purchase of two staple fibre machines and auxiliary machines. It was contended that the movable property of defendant 22 were sold below its fair market value. But there was no evidence of the true value of the movable property. There was however evidence that the movable property was resold to defendant 13 for RM650,000, which was RM393,000 less than the RM1,043,000 that defendant 22 had sold them. In the light of that

evidence which we find sufficient to make our assessment (see *Doyle v Olby Ltd* [1969] 2 QB 158,), we would estimate that to put the plaintiffs back to a position that they would have been had the breach not been committed, should be the disgorgement of (a) the raw material (RM5,398,830.33) less RM830,000, (b) the payments towards the machinery (RM2,883,284.01), (c) the difference between the sale price (RM1,043,000) and the resale price (RM650,000) of the movable property of defendant 22, and, (d) the sum of RM2,087,817.10 that was in the account of defendant 22 on 27 March 2008. That would return RM9,932,931.40 to the plaintiffs, out of the total investment of RM23,894,588.47.

[106] There were no pleaded facts to justify the claim for exemplary damages, or to show that Alan's conduct was calculated to make a profit which exceeded the compensation payable to the plaintiffs. In *Broome v Cassell & Co Ltd and another* [1971] 2 QB 354; [1971] 1 All ER 262, it was contended that it was not open to the plaintiff on the pleading to claim exemplary damages as the amended statement of claim in the consolidated actions contained no averments which would justify a claim for exemplary damages and without such averments there was no issue of exemplary damages before the court. Counsel for the first defendant submitted that a claim for exemplary damages must be founded on fact which brings the claim within one or other of the exception categories specified in *Rookes v Barnard* [1964] AC 1129, and that when no such facts are pleaded a claim for libel should proceed on the basis that the plaintiff is claiming no more than compensation for the damage to his reputation and for the grief and annoyance he has himself suffered. Lawton J held:

> The object of pleadings is to enable: first, the parties to know what case is being made by the other side; and, secondly, for the court to know what are the issues to be tried. The days when pleadings were a form of catch-as-catch-can are over. If there was any doubt about this amongst practitioners, which there ought not to have been, these doubts were allayed by the Court of Appeal in *Perestrello e Companhia Limitada v United Paint Co Ltd*. The judgment of the court in that case was delivered by Lord Donovan. The question arose as to the way in which damage had been pleaded and in the course of his judgment Lord Donovan said ([1969] 3 All ER at pp 485–486, [1969] 1 WLR at p 579):
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> > Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case.

Then he quoted from Bowen LJ in *Ratcliffe v Evans* ([1892] 2 QB 524 at p 529; [1891–4] All ER Rep 699 at p 702): 'The question to be decided does not depend on words, but is one of substance'. Towards the end of his judgment Lord Donovan said ([1969] 3 All ER at p 486, [1969] 1 WLR at p 580):

> What amounts to a sufficient averment for this purpose will depend on the facts of the particular case, but a mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning.

Applying those principles to this case, the defendants, and each of them, would seem to be entitled to fair warning of what was going to be claimed and to have the relevant facts pleaded. Counsel for the plaintiff replied that in his wide experience of this class of litigation this was the first time that anyone had suggested that the facts on which a claim for exemplary damages was based should be pleaded. Further, he called my attention to *Manson v Associated Newspapers Ltd*, in which the trial judge left the issue of exemplary damages to the jury without, so it seems, from the report, any specific facts having been pleaded. It seems probable that in that case no one invited the judge's attention to the point which is being argued before me.

I adjudge that evidence on this issue cannot be led in the absence of facts relevant to it being pleaded. The House of Lords in *Rookes v Barnard* has clarified the law and has decreed that exemplary damages are an exceptional form of award. In these circumstances anyone who wishes to say that he is making an exceptional kind of claim for damages and not a normal one should say so in his pleading.

[107] That ruling of Lawton J was reversed by the Court of Appeal (*Broome v Cassell & Co Ltd and another* [1971] 1 All ER 262; [1971] 2 QB 354) who held, per Denning MR, that a claim of exemplary damages need not be expressly pleaded since such damages could be awarded in respect of any conduct of the defendant until the end of the proceedings.

[108] That contrary ruling of the Court of Appeal in *Broome v Cassell & Co Ltd and another* was undone in 1972, by O 18 r 8(3) of the Rules of the Supreme Court which read that 'a claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies' to give a defendant 'fair warning of what is going to be claimed with the relevant facts, and thus to prevent surprise at the trial, to avoid the need for any adjournment of the trial on the ground, and at the same time, to extend the ambit of the discovery before trial' (*Supreme Court Practice 1976* Vol 1 para 18/8/3).

[109] Hence, *Halsbury's Laws of England* (4th Ed), Reissue, Vol 12(1) para 1147 states:

A Exemplary damages. The claimant must specifically plead any claim for exemplary damages, together with the facts on which he relies. The assertion of such a claim needs to be made in the body of the claim and not just in the prayer, because all of the facts giving rise to the claim must be set out.

B **[110]** At present in England, in any case where exemplary damages are sought, it will be necessary to plead, and to plead with specificity, facts and matters alleging that the competition law infringement in question was executed either intentionally in breach of the law or recklessly so as to be regarded as sufficiently outrageous as to fall within Lord Devlin's second C category in *Rookes v Barnard*; *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] All ER (D) 84 (Jul); see also *Coflexip SA Coflexip Stena Offshore Limited v Stolt Offshore MS Limited and others* [2003] EWCA Civ 296.

D **[111]** In the absence of the pleadings to justify the prayer, we could also not support the award for exemplary damages (see also *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)* [2011] 4 MLJ 354, where it was held by Chew Soo Hoo JC, and we E agree with him, that a mere prayer without the facts relied in the body of the claim was wholly insufficient for the court to consider exemplary damages).

[112] And for the same reason, namely that it was not claimed nor pleaded against defendants 3, 4 and 13, we could also not support the order that F defendants 3, 4 and 13 do return the purchase price of RM591,059.50 to Doran.

[113] For the reasons aforesaid, we unanimously (a) allow in part the appeal of Alan with no order as to costs, and (b) allow all appeals of the other G defendants with costs. And we unanimously make the following consequential orders: (c) that Alan do pay the plaintiffs the sum of RM9,932,931.40 together with interest at the rate of 4%pa from the date of judgment below to date of satisfaction, and (d) that save as otherwise expressly provided, all orders of the court below, with respect to the claim for breach of shareholders' agreement H and breach of fiduciary duties and knowing assistance are hereby set aside.

[114] As for the incidental claim, it was the finding of the court below that on the advice of Alan, Doran paid RM590,000 towards his purchase of the said condominium through defendant 20 as trustee for Doran. It was the pleaded I case that Alan was also Doran's trustee for the said condominium (see para 44 at 440AR). The pleaded defence of Alan was that the said RM590,000 was repaid to defendant 22. However, it was the finding of the court below that repayment by defendant 20 to 22 was not proved (see 166JB). Absolutely no reason was made out to disturb that finding. We therefore unanimously dismiss

those appeals against that order with costs and affirm the order that Alan and defendant 20, who withdrew its appeal, do pay Doran the sum of RM590,000 together with interest at the rate of 4%pa from the date of judgment below to date of satisfaction.

Appeal allowed in part with no order as to costs; appeal of other defendants allowed with costs.

Reported by Afiq Mohamad Noor